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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 JESSICA WILLIAMS,

10 *Petitioner,*

11 v.

12 JO GENTRY, *et al.*¹

13 *Respondents.*
14

Case No. 2:04-cv-01620-KJD-EJY

ORDER

15 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a final
16 decision on the multiple grounds presented.

17 ***Introduction***

18 Petitioner Jessica Williams seeks to overturn her 2001 Nevada state conviction,
19 pursuant to a jury verdict, of six counts of driving with a prohibited substance in her blood
20 in violation of then N.R.S. 484.3795(1)(f).

21 The criminal case arose from the tragic deaths of six teenagers assigned to a
22 roadside cleanup crew who were struck and killed on March 19, 2000, when the vehicle
23 that Williams was driving veered off the road into the median. According to the factual
24 summary by the Supreme Court of Nevada, Williams had stayed up all night the prior

25 _____
26 ¹ It appears from the inmate locator page on the state corrections department's website that Ms.
27 Williams is out on parole on her sixth and final consecutive sentence. Should there be any further
28 proceedings in this federal matter, the parties should substitute a proper current respondent in the place of
her former physical custodian. The 1976 Advisory Committee Notes to Subdivision (b) of Rule 2 of the
Rules Governing Section 2254 Cases suggest that the proper respondent for a petitioner who is on parole
is "the particular . . . parole officer responsible for supervising the applicant, and the official in charge of the
parole or probation agency, or the state correctional agency, as appropriate."

1 evening. Williams admitted that she had smoked marijuana approximately two hours
 2 before veering off the road and that she had used the drug “ecstasy” the prior evening.
 3 Williams had a pipe with marijuana residue and a plastic bag with marijuana. Blood draws
 4 taken that day tested positive for the presence of the active ingredient of marijuana and
 5 a metabolite thereof. Williams maintained that she had fallen asleep at the wheel. See
 6 *Williams v. State*, 118 Nev. 536, 50 P.3d 1116, 1126-27 (2002) (*Williams I*).²

7 Williams was charged with, *inter alia*, six counts of violating then N.R.S. 484.3795,
 8 which provided in pertinent part at the relevant time:

9 1. A person who:

10

11 (d) Is under the influence of a controlled
 12 substance or is under the combined influence of
 13 intoxicating liquor and a controlled substance;

14 ; or

15 (f) Has a prohibited substance in his blood or
 16 urine in an amount equal to or greater than the
 17 amount set forth in subsection 3 of N.R.S.
 484.379,

18 and does any act or neglects any duty imposed by law while
 19 driving or in actual physical control of any vehicle on or off the
 20 highways of this state, if the act or neglect of duty proximately
 causes the death of, or substantial bodily harm to, a person
 other than himself, is guilty of a category B felony

21 N.R.S. 484.3795(1)(d) & (f), *recodified at* N.R.S. 484C.430(d) & (f).³

22 _____
 23 ² The parties do not challenge the accuracy of the state supreme court’s background factual recital,
 which accordingly is presumed to be correct under 28 U.S.C. § 2254(e)(1). See, e.g., *Sims v. Brown*, 425
 24 F.3d 560, 563 n.1 (9th Cir. 2005).

25 This Court makes no credibility findings or other factual findings regarding the truth or falsity of
 evidence or statements of fact in the state court. The Court summarizes same solely as background to the
 26 issues presented in this case, and it does not summarize all such material. No statement of fact made in
 describing statements, testimony or other evidence in the state court constitutes a finding by this Court.

27 ³ The three principal statutory provisions discussed herein all were recodified under different
 28 numbering in a 2009 revision, without any change of substance. The Court will reference the new
 numbering in the initial citation to each provision, but the Court otherwise will cite thereafter to the original
 numbering.

1 The jury acquitted Williams on all six counts of the statutory alternative under
2 N.R.S. 484.3795(1)(d) based upon being under the influence of a controlled substance.
3 The jury convicted Williams on all six counts the alternative under N.R.S. 484.3795(1)(f)
4 based upon having a prohibited substance in her blood in a requisite amount. This verdict
5 in turn was based upon evidence seeking to establish that Williams had the active
6 ingredient of marijuana and also a metabolite thereof in her bloodstream. *Williams I*, 118
7 Nev. at 539-40, 50 P.3d at 1118-19 (discussing also other charges).

8 Following review, and for the reasons discussed herein, the Court grants a
9 conditional writ of habeas corpus on Ground 8(a) of the petition, as amended, subject to
10 the State's ability to retry Williams within the time period established by this order. The
11 Court discusses Ground 8(a) first and then the related Grounds 8(b) and 9.

12 The Court denies relief on all remaining grounds other than Ground 8(a) for the
13 reasons stated herein, including Grounds 1, 4, 5, 7, 8(b) and 9. Technically, the Court
14 need not necessarily reach any grounds as to which Williams may not secure greater
15 relief than she has via the conditional writ granted herein. However, the Court had done
16 extensive work on all then-pending grounds prior to entry of the stay in 2011; and it has
17 updated that prior work on all remaining grounds in preparing this order. At this point,
18 after now many years of combined state and federal litigation, the matter should be
19 postured for a definitive and final resolution in the event of any appeal from the current
20 order and judgment. The Court accordingly issues a decision as to all remaining claims
21 presented, so that, *inter alia*, this matter potentially may be conclusively resolved on any
22 appeal without a remand based at least on the presence of unadjudicated claims. While
23 the Court is fully confident that a conditional writ grant is warranted on Ground 8(a), a
24 resolution of all claims pending in the district court by this order best serves the interests
25 of justice for all concerned after now two decades of state and federal litigation.

26 ***Standard of Review***

27 When the state courts have adjudicated a claim on the merits, the Antiterrorism
28 and Effective Death Penalty Act of 1996 (AEDPA) imposes a "highly deferential" standard

1 for evaluating the state court ruling that is "difficult to meet" and "which demands that
2 state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S.
3 170 (2011). In particular, "[a]n application for a writ of habeas corpus on behalf of a
4 person in custody pursuant to the judgment of a State court shall not be granted with
5 respect to any claim that was adjudicated on the merits in State court proceedings unless
6 the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved
7 an unreasonable application of, clearly established Federal law, as determined by the
8 Supreme Court of the United States; or (2) resulted in a decision that was based on an
9 unreasonable determination of the facts in light of the evidence presented in the State
10 court proceeding." 28 U.S.C. § 2254(d).

11 Under this highly deferential standard of review, a federal court may not grant
12 habeas relief merely because it might conclude that the state court decision was incorrect.
13 *Pinholster*, 563 U.S. at 202.

14 Rather, a state court decision is "contrary to" law clearly established by the
15 Supreme Court only if it applies a rule that contradicts the governing law set forth in
16 Supreme Court case law or if the decision confronts a set of facts that are materially
17 indistinguishable from a Supreme Court decision and nevertheless arrives at a different
18 result. *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (*per curiam*). A state court
19 decision is not contrary to established federal law merely because it does not cite the
20 Supreme Court's opinions. *Id.* Indeed, the Supreme Court has held that a state court
21 need not even be aware of its precedents, so long as neither the reasoning nor the result
22 of its decision contradicts them. *Id.* Moreover, "[a] federal court may not overrule a state
23 court for simply holding a view different from its own, when the precedent from [the
24 Supreme] Court is, at best, ambiguous." 540 U.S. at 16. For, at bottom, a decision that
25 does not conflict with the reasoning or holdings of Supreme Court precedent is not
26 contrary to clearly established federal law.

27 A state court decision constitutes an "unreasonable application" of clearly
28 established federal law only if it is demonstrated that the state court's application of

Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *E.g., Mitchell*, 540 U.S. at 18; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

To the extent that a state court's factual findings are challenged, the "unreasonable determination of fact" clause of Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id.* The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference to the state court factual finding:

. . . . [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); see also *Lambert*, 393 F.3d at 972.

In contrast, when the state courts have not adjudicated a claim on the merits, such as where the state courts rejected the claim instead on procedural grounds, the above-described AEDPA deference on legal and factual issues does not apply; and the federal courts instead review the claim *de novo*. *E.g., Pirtle v. Morgan*, 313 F.3d 1160, 1165 & 1167-68 (9th Cir. 2002).

However, in all events, under 28 U.S.C. § 2254(e)(1), any state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. *E.g., Pirtle*, 313 F.3d at 1168.

Discussion

Ground 8(a): Denial of Fair Warning by Judicial Expansion of Statute

In Ground 8(a), Williams alleges in principal part that she was denied due process of law in violation of the Fourteenth Amendment when she was denied fair warning of the conduct prohibited by an unforeseeable and retroactive judicial expansion of the relevant

1 statutes by the state supreme court. She alleges that the statutes as written did not give
 2 fair warning that the presence of an inactive ingredient of marijuana, marijuana
 3 metabolite, in her bloodstream would bring her within the terms of the statutes. She
 4 alleges that she thus could not be convicted based upon what therefore was an improper
 5 alternative theory of culpability, the presence of marijuana metabolite in her bloodstream,
 6 such that a new trial is required. (ECF No. 110, at 44-47.)

7 ***Review of the Merits***

8 Ground 8(a) was rejected by the state supreme court on the basis of procedural
 9 default rather than on the merits. (ECF No. 98-4, at 11.) Federal habeas review of the
 10 merits thus is *de novo* following upon Williams having overcome the procedural default.

11 In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court reaffirmed
 12 the bedrock principle that a criminal statute must provide fair notice of what is prohibited
 13 by the statute:

14 The basic principle that a criminal statute must give fair
 15 warning of the conduct that it makes a crime has often been
 16 recognized by this Court. As was said in *United States v.*
Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,

17 “The constitutional requirement of definiteness
 18 is violated by a criminal statute that fails to give
 19 a person of ordinary intelligence fair notice that
 20 his contemplated conduct is forbidden by the
 21 statute. The underlying principle is that no man
 shall be held criminally responsible for conduct
 which he could not reasonably understand to be
 proscribed.”

22 We have recognized [*inter alia*] . . . that “No one may be
 23 required at peril of life, liberty or property to speculate as to
 24 the meaning of penal statutes. All are entitled to be informed
 as to what the State commands or forbids.” *Lanzetta v. New*
Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

25 378 U.S. at 350-51 (citation to additional authorities omitted).

26 The undersigned strongly encourages the judges conducting any appellate review
 27 in this case to review an actual physical hard copy bound volume containing the relevant
 28 statutes within the Nevada Revised Statutes.

1 A person of ordinary intelligence would see the following in a hard copy volume
2 containing the statute prior to March 19, 2000.

3 Under the chapter subheading "General Provisions," the second statute in Chapter
4 484 of the Nevada Revised Statutes provided:

5 **NRS 484.013 Definitions.**

6 As used in this chapter, unless the context otherwise
7 requires, the words and terms defined in 484.014 to 484.217,
8 inclusive, have the meanings ascribed to them in those
9 sections.

8 N.R.S. 484.013, *as amended through* 1999 Laws, ch. 622, § 21, p. 3415 (now N.R.S.
9 484C.010) (the 1999 law expressly added what came to be codified as N.R.S. 484.1245).

10 Under the same chapter subheading "General Provisions" in Chapter 484, nearly
11 100 statutes provided definitions that thus were generally applicable to the remaining
12 provisions in Chapter 484. The definitions were set forth in alphabetical order, from
13 "Administrative roadblock" in N.R.S. 484.014 through "Vehicle" in N.R.S. 484.217.

14 These generally-applicable statutory definitions for the entirety of Chapter 484
15 included the following definition:

16 **NRS 484.1245 "Prohibited substance" defined.**

17 "Prohibited substance" means any of the following
18 substances if the person who uses the substance has not
19 been issued a valid prescription to use the substance *and the*
20 *substance is classified in schedule I or II pursuant to NRS*
21 *453.166 or 453.176 when it is used:*

- 21 1. Amphetamine.
- 22 2. Cocaine or cocaine metabolite.
- 23 3. Heroin or heroin metabolite (morphine or 6-
24 monoacetyl morphine).
- 25 4. Lysergic acid diethylamide.
- 26 5. Marijuana or marijuana metabolite.
- 27 6. Methamphetamine.
- 28 7. Phencyclidine.

1 N.R.S. 484.1245, as added by 1999 Laws, ch. 622, § 21, p. 3414-15 (currently
2 redesignated as N.R.S. 484C.080) (emphasis added).

3 It is undisputed that marijuana metabolite was not classified in the schedule I or II
4 referred to in N.R.S. 484.1245 at the time of the incident. See, e.g., *State v. Williams*,
5 120 Nev. 473, 480, 93 P.3d 1258, 1262 (2004) (*Williams II*). In contrast, other metabolites
6 referred to in N.R.S. 484.1245 were classified under schedules I or II, such as, for
7 example, the classification of cocaine metabolite under schedule II. (See state district
8 court finding at ECF No. 76-20, at 3.)

9 As noted previously, Williams was convicted of, *inter alia*, six counts of violating
10 N.R.S. 484.3795(1)(f), which provided in pertinent part:

11 1. A person who:

12

13 (f) Has a prohibited substance in his blood or
14 urine in an amount equal to or greater than the
15 amount set forth in subsection 3 of N.R.S.
484.379,

16 and does any act or neglects any duty imposed by law while
17 driving or in actual physical control of any vehicle on or off the
18 highways of this state, if the act or neglect of duty proximately
causes the death of, or substantial bodily harm to, a person
other than himself, is guilty of a category B felony

19 N.R.S. 484.3795(1)(f), as amended through 1999 Laws, ch. 480, § 9, p. 2452-53, ch. 622,
20 § 28, p. 3422-23 (currently redesignated as N.R.S. 484C.430(1)(f)).

21 In using the phrase “prohibited substance,” N.R.S. 484.3795(1)(f) did not expressly
22 state a definition for “prohibited substance” over and above the generally applicable
23 definition provided for in N.R.S. 484.1245 for the entirety of Chapter 484.

24 N.R.S. 484.379(3), in turn, provided in pertinent part as follows:

25 3. It is unlawful for any person to drive or be in actual
26 physical control of a vehicle on a highway or on premises to
27 which the public has access with an amount of a prohibited
28 substance in his blood or urine that is equal to or greater than:

<i>Prohibited substance</i>	<i>Urine Nanograms per milliliter</i>	<i>Blood Nanograms per milliliter</i>
(a) Amphetamine	500	100
(b) Cocaine	150	50
(c) Cocaine metabolite	150	50
(d) Heroin	2,000	2
(e) Heroin metabolite		
(1) Morphine	2,000	50
(2) 6-monoacetyl morphine	10	10
(f) Lysergic acid diethylamide	25	10
(g) Marijuana	10	2
(h) Marijuana metabolite	15	5
(i) Methamphetamine	500	100
(j) Phencyclidine	25	10

N.R.S. 484.379(3) *as amended through* 1999 Laws, ch. 480, § 7, p. 2451, ch. 622, § 23, p. 3415-16 (currently redesignated as N.R.S. 484C.110(3)).

In using the phrase “prohibited substance,” N.R.S. 484.379 did not expressly state a definition for “prohibited substance” over and above the generally-applicable definition provided for in N.R.S. 484.1245 for the entirety of Chapter 484.

The natural reading of these three provisions to a person of ordinary intelligence would be that a person would be guilty of violating N.R.S. 484.379(1)(f) if (a) they had a prohibited substance as defined by N.R.S. 484.1245 in their blood or urine in an amount equal to or greater than the amount specified in N.R.S. 484.379(3), and (b) they proximately caused the death of or substantial bodily harm to another person through an act or neglect of legal duty while driving or controlling a vehicle.

This natural reading of the three provisions to a person of ordinary intelligence was to an extent reinforced by Nevada jurisprudence prior to March 19, 2000. In civil litigation

1 applying Chapter 484 of the Nevada Revised Statutes, the definition of a term or phrase
2 in the opening “General Provisions” section of the chapter controlled and established the
3 meaning of the remaining provisions in the chapter. In *Elliott v. Mallory Electric*
4 *Corporation*, 571 P.2d 397 (Nev. 1977), the plaintiff argued that a vehicle on private land
5 was encompassed within the reach of N.R.S. 484.445 because “[o]n its face, the statute
6 is unqualified and, standing alone, would appear to apply to vehicles wherever located.”
7 571 P.2d at 399. The Supreme Court of Nevada responded that: “Chapter 484 as a
8 whole, however, indicates a more limited intent.” *Id.* N.R.S. 484.777(1) stated that the
9 chapter applied only to “highways,” and N.R.S. 484.065 – from the “General Provisions”
10 – defined a “highway” in pertinent part as a way “maintained by a public authority,” as
11 opposed to a private entity. The Nevada high court thus did not ignore a narrowing
12 definition in the opening “General Provisions” when that qualification was not expressly
13 referenced in a later specific provision, reading Chapter 484 “as a whole.”⁴

14 Additionally given such prior jurisprudence, a person of ordinary intelligence would
15 conclude that a narrowing definition in the “General Provisions” in Chapter 484 would
16 control the meaning of the same terminology in other portions of the chapter, even if the
17 narrowing qualification in the definition statute was not expressly repeated in a later
18 specific provision. Such a natural reading of the statute would tend to follow with even
19 greater force due to the strict construction given criminal prohibitions.

20 In 2003, the state district court granted Williams a new trial on postconviction
21 review based upon the above-described reading of the statutes. The district court
22 concluded that marijuana metabolite did not constitute a prohibited substance for
23 purposes of N.R.S. 484.3795(1)(f) because marijuana metabolite was not listed in the
24 referenced schedule I or II at the relevant time and therefore did not fall within the
25 definition of prohibited substance in N.R.S. 484.1245. (ECF No. 76-20, at 2-5.)

26
27 ⁴ See also *Lee v. State*, 997 P.2d 138 (Nev. 2000) (in a criminal case decided less than a month
28 after the incident in this case, the state supreme court similarly held that the opening definition of “highway”
in Chapter 484 controlled, reversing the conviction).

1 The state supreme court reversed, holding that Williams' claim was procedurally
2 barred because it was a new claim that could have been raised in prior proceedings. The
3 court held in this regard, *inter alia*, that Williams could not establish actual prejudice to
4 overcome the procedural bar because "marijuana metabolite is a prohibited substance
5 under NRS 484.379 and 484.1245." *Williams II*, 93 P.3d at 1261. The court stated that
6 "NRS 484.379 clearly lists marijuana metabolite as a prohibited substance and gives the
7 amount in nanograms per milliliter that must be present in the blood or urine to constitute
8 a violation of the statute." *Id.*

9 The court acknowledged that N.R.S. 484.1245 was "also the part of the same
10 statutory scheme" as the other provisions and further that marijuana metabolite was not
11 listed in the schedules expressly referenced in 484.1245. *Id.*, at 1261-62. The court
12 nonetheless rejected Williams' reliance upon the provision as thus not including marijuana
13 metabolite in the definition of prohibited substance because "it is clear from the plain
14 language of both NRS 484.379 and 484.1245 that marijuana metabolite is a prohibited
15 substance." *Id.* The court further relied upon legislative history, including committee
16 hearings, reflecting, first, that the three provisions all were added to Chapter 484 by the
17 same bill and, second, that marijuana metabolite was added to the listing in the statutes
18 along with several other substances after it was determined that there were standards for
19 detecting these substances in the blood. The court concluded from this summary of the
20 legislative history that "the Legislature intended to specifically list marijuana metabolite as
21 a prohibited substance under NRS 484.1245 and 484.379(3), and to incorporate it by
22 reference under NRS 484.3795(1)(f)." *Id.*

23 The Supreme Court of Nevada of course is the final arbiter of Nevada state law.
24 But, as noted, it is a bedrock principle of federal due process law that a criminal statute
25 must provide fair notice of that which is prohibited by the statute. *Bouie, supra*.

26 That bedrock due process principle can be violated by vague or overbroad
27 language in a criminal statute that leaves one to speculate as to its meaning. *Bouie*, 378
28 U.S. at 351-52. However, *Bouie* further instructs that the fair warning required by due

1 process also can be denied by an unforeseeable retroactive judicial expansion of a
2 criminal statute:

3 It is true that in the Connally and Lanzetta cases, and
4 in other typical applications of the principle, the uncertainty as
5 to the statute's prohibition resulted from vague or overbroad
6 language in the statute itself, and the Court concluded that the
7 statute was "void for vagueness." The instant case seems
8 distinguishable, since on its face the language of . . . [the state
9 statute] was admirably narrow and precise The thrust of
10 the distinction, however, is to produce a potentially greater
11 deprivation of the right to fair notice in this sort of case, *where*
12 *the claim is that a statute precise on its face has been*
13 *unforeseeably and retroactively expanded by judicial*
14 *construction*, than in the typical 'void for vagueness' situation.
15 When a statute on its face is vague or overbroad, it at least
16 gives a potential defendant some notice, by virtue of this very
17 characteristic, that a question may arise as to its coverage,
18 and that it may be held to cover his contemplated conduct.
19 When a statute on its face is narrow and precise, however, it
lulls the potential defendant into a false sense of security,
giving him no reason even to suspect that conduct clearly
outside the scope of the statute as written will be retroactively
brought within it by an act of judicial construction. If the
Fourteenth Amendment is violated when a person is required
"to speculate as to the meaning of penal statutes," as in
Lanzetta, or to "guess at [the statute's] meaning and differ as
to its application," as in Connally, the violation is that much
greater when, because the uncertainty as to the statute's
meaning is itself not revealed until the court's decision, a
person is not even afforded an opportunity to engage in such
speculation before committing the act in question.

20 378 U.S. at 351-52 (emphasis added).

21 In reviewing the federal due process claim here on *de novo* review, the Court holds
22 that Williams was denied due process of law because the state supreme court's
23 unforeseeable and retroactive expansion of the reach of the otherwise clear language of
24 the relevant state statutes denied Williams fair notice of what was prohibited.

25 As written, this is a simple and clear state statutory scheme.

26 If the substance is defined as a prohibited substance under N.R.S. 484.1245 and
27 is present in an amount satisfying N.R.S. 484.379, then the defendant is guilty of violating
28 N.R.S. 3795(f)(1) in the additional circumstances set forth therein.

1 It is that simple.

2 And the language used in the statute is clear and precise. If a substance listed in
3 N.R.S. 484.1245 is not listed in the referenced schedules, it is not a prohibited substance
4 for purposes of Chapter 484.

5 Nothing in either of the two state supreme court decisions discussing the statutory
6 scheme in truth states a foreseeable basis for disregarding the clear and precise
7 legislative language requiring that a substance must be listed in the referenced schedules
8 to be a prohibited substance.⁵

9 The state high court stated multiple times, in pertinent part, that “marijuana
10 metabolite is a prohibited substance under . . . NRS . . . 484.1245.” *E.g., Williams II*, 93
11 P.3d at 1261; see also *id.*, at 1262 (“it is clear from the plain language of . . . NRS . . .
12 484.1245 that marijuana metabolite is a prohibited substance”). Such a bald statement
13 simply reads out of that statute the clear and precise language stating that “‘Prohibited
14 substance’ means any of the following substances *if [inter alia]* . . . *the substance is*
15 *classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used.*”

16 ⁵ The Court emphasizes that this is *de novo* review of a federal law due process fair warning claim.
17 The state supreme court did not decide such a federal claim on the merits in either *Williams II* in 2004 or
18 on the later appeal in 2016 during the federal stay. Such a federal claim was not presented during *Williams*
19 *II* in 2004, which is what led to the federal stay. See ECF No. 78, at 5-6 & 10. And on appeal during the
20 stay, the state supreme court clearly did not decide any federal law claim on the merits, including as an
21 alternative basis for decision. The court instead eschewed making any holding on the merits, stating that
22 “[w]e address the merits of Williams’ claims of ineffective assistance of counsel and judicial expansion only
23 in the context of determining whether she has demonstrated actual prejudice.” ECF No. 98-4, at 11. In a
24 related vein, such an express statement clearly establishes that the state court is deciding the state appeal
25 on a state law ground that is independent of the federal law issue. *E.g., Moran v. McDaniel*, 80 F.3d 1261,
26 1269 (9th Cir. 1996). It further is well-established that if a state court rejects a claim solely on the basis of
27 procedural default and that default is overcome in federal court, as it has been here, then federal review of
28 the merits of the federal law claim is *de novo*. See, e.g., *Williams v. Filson*, 908 F.3d 546, 564 (9th Cir.
2018) (following holding that the procedural bar invoked was not an adequate state law ground); *Riley v.*
McDaniel, 786 F.3d 719, 723 (9th Cir. 2015) (same); *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014)
(*en banc*); *Pirtle*, *supra*. See also *Visciotti v. Martel*, 862 F.3d 749, 768-69 (9th Cir. 2016) (a federal court’s
review of cause and prejudice issues is *de novo* when the state court makes a stand-alone cause-and-
prejudice determination). The Court rejected respondents’ procedural default defense in this case because
the state law bar was not an adequate ground in the circumstances presented. (See ECF No. 67, at 13;
ECF No. 116, at 5-9; ECF No. 133.)

Accordingly, when this Court discusses the state supreme court’s stated reasoning on the state law
issue in its prejudice analysis, it does so strictly as a federal court reviewing the federal due process fair
warning claim on the merits on a *de novo* basis, in considering whether the state high court unforeseeably
expanded the state statute. Adjudication of Nevada state law is exclusively the province of the Supreme
Court of Nevada, but this Court in turn is duty bound to adjudicate the related federal constitutional issue.

1 Undeniably, marijuana metabolite was not listed in the referenced schedules at the
2 relevant time; and the clear and precise language of the statutory definition in N.R.S.
3 484.1245 therefore was not satisfied. The state supreme court's repeating a statement
4 multiple times instead that "marijuana metabolite is a prohibited substance under N.R.S.
5 484.1245" does not make that statement either true or a foreseeable construction of the
6 statute to a person of ordinary intelligence.⁶

7 In this same vein, the state supreme court elaborated in its 2016 decision:

8 Finally, the plain language of NRS.484.1245 included
9 the words "marijuana metabolite." It is difficult to conceive
10 under these circumstances how this court expanded the
11 scope of NRS 484.1245 in a novel, unforeseeable, or
12 indefensible fashion by reading the words "marijuana
13 metabolite" as being included in the definition of a prohibited
14 substance when those exact words were used. Thus,
15 Williams' [sic] fails to demonstrate actual prejudice to
16 overcome the filing of a late petition.

17 (ECF No. 98-4, at 17.)

18 This analysis would have been compelling if N.R.S. 484.1245 in fact had said only:
19 "Prohibited substance' means any of the following substances," followed immediately by
20 a list of substances that included the exact words "marijuana metabolite." In such a
21 statute, the use of those exact words would have signified that marijuana metabolite was
22 a prohibited substance for purposes of Chapter 484.

23 But the statute did not say that. The statute very clearly and precisely stated that
24 "Prohibited substance' means any of the following substances," *if* two conditions were
25 met, and the second one indisputably was not met as to marijuana metabolite. The state
26 supreme court's question-begging "those exact words were used" analysis thus indeed
27 was novel, unforeseeable, and indefensible. A person of ordinary intelligence could not
28 foresee that the state high court would read only the "marijuana metabolite" exact words

⁶ This Court of course omitted for this paragraph the references in the quotes by the Supreme Court of Nevada also to N.R.S. 484.379. However, for a statement that marijuana metabolite is a prohibited substance under the plain language of "both" statutes to be true, that statement must be true as to each statute. The state high court's statement clearly is not true as to N.R.S. 484.1245. This Court discusses N.R.S. 484.379 below.

1 while disregarding the additional exact, clear and precise statutory words stating that the
2 listed substances, including marijuana metabolite, would be “prohibited substances”
3 under Chapter 484 only if, *inter alia*, included in the referenced schedules. Again, the
4 state supreme court simply read out of the statute exact, clear and precise words that
5 precluded marijuana metabolite and the other listed substances from being a prohibited
6 substance where a substance was not included in the referenced schedules.

7 The state supreme court continued to disregard the limiting definition in N.R.S.
8 484.1245 when it relied upon the listing of marijuana metabolite in N.R.S. 484.379. See
9 *Williams II*, 93 P.3d at 1261; ECF No. 98-4, at 14-15. Yet the list in N.R.S. 484.379 lists
10 the same substances that are listed in N.R.S. 484.1245, in substantially the same order,
11 only adding specific threshold amounts for a violation. No language in N.R.S. 484.379
12 purports to define “prohibited substance” at all, much less any differently than the
13 controlling actual definition of “prohibited substance” set forth in N.R.S. 484.1245, which
14 lists the same substances in that same order. N.R.S. 484.379, unlike N.R.S. 484.1245,
15 does not state what “prohibited substance” “means;” and the statute, again only
16 establishes threshold amounts for a violation, within a statutory scheme where the clear
17 and precise language in N.R.S. 484.1245 established when a listed substance would be
18 a prohibited substance.

19 The state high court’s legislative history analysis similarly begged the question.

20 The supreme court noted that an earlier version of the proposed legislation had
21 included a list instead of “controlled substances” that included twenty-one substances but
22 did not include, *inter alia*, cocaine metabolite, heroin metabolite, marijuana, and marijuana
23 metabolite. In later committee hearings, however, it was determined that only substances
24 for which “there was a standard for detecting [the substances] in the blood” should be
25 included, as opposed to “simply looking for ‘detectable amounts’ of each substance.” As
26 a result, substances for which there was no established standard for detection in the blood
27 were deleted from the list and substances for which there was such a standard, such as
28 marijuana metabolite, were added to the list. The court concluded from this legislative

1 history that “the Legislature intended to specifically list marijuana metabolite as a
2 prohibited substance under NRS 484.1245 and 484.379(3), and to incorporate it by
3 reference under NRS 484.3795(1)(f).” See *Williams II*, 93 P.3d at 1262-63.

4 The court elaborated in its 2016 decision during the federal stay that this legislative
5 history “indicated that the Legislature specifically intended marijuana metabolite to be
6 included in the *definition* of a prohibited substance.” (ECF No. 98-4, at 12, emphasis
7 added.) The court pointed again to the legislative choice “to set forth statutory amounts
8 of prohibited substances rather than following the approach in the original bill of punishing
9 any detectable amount.” (*Id.*, at 15-16, n.5.) The court concluded that this was “evidence
10 of the Legislature’s thoughtful decision to include marijuana metabolite *within the*
11 *definition* of a prohibited substance *regardless of the language referring to the schedule.*”
12 (*Id.*, emphasis added.)

13 The substantial problem with this analysis is that, clearly, all three statutory
14 provisions were part of the *same* legislative enactment. *E.g.*, *Williams II*, 93 P.3d at 1262
15 (“NRS 484.1245, 484.379(3), and 484.3795(1)(f) are all additions to Chapter 484, arising
16 from Senate Bill 481 during the 70th Session of the Nevada Legislature.”). The same
17 legislature that changed the constituents in the original list in the bill to only items with an
18 established standard for measurement in the blood also changed that original list from
19 one simply of “controlled substances.” That same legislature instead adopted – in the
20 final legislation – the limiting concept of “prohibited substance,” which it then expressly,
21 clearly and precisely defined as a substance that was listed *and, inter alia, also* was
22 “*classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used.*” N.R.S.
23 484.1245 (emphasis added). The state high court’s strained legislative history analysis
24 literally disregarded this clear and precise definition, opting to instead construe the statute
25 as adopting a *different definition* than was stated in the legislation “*regardless of the*
26 *language referring to the schedule.*” (ECF No. 98-4, at 15-16, n.5, emphasis added.)

27 Such a novel and unforeseeable legislative history analysis, expressly
28 disregarding clear statutory language, could not have been anticipated by a person of

1 ordinary intelligence. Such an analysis would not have been foreseeable to a person of
2 ordinary intelligence even if they had dug down into bill histories and contemporaneous
3 legislative committee hearing transcripts over and above an assessment based directly
4 on the clear and plain language of the statute.

5 The Supreme Court of Nevada again is the final arbiter of Nevada state law. The
6 court has the authority, as that final arbiter, to effectively read language out of a state
7 statute, including a state criminal statute. But when the state high court effectively read
8 out of N.R.S. 484.1245 the clear and precise language requiring that a substance must
9 be listed in the referenced schedules to be a prohibited substance, Williams was denied
10 fair warning in violation of the federal Due Process Clause.

11 Again, it is that simple. For a person of ordinary intelligence who pulled the actual
12 hard copy volume down off the shelf and viewed the relevant statutory provisions in their
13 entirety in context, the state supreme court's construction of the law expressly
14 "regardless" of what the state legislature instead in fact had said in N.R.S. 484.1245 was
15 wholly unforeseeable.

16 The Court accordingly holds, on *de novo* review, that Williams was deprived of fair
17 warning by an unforeseeable and retroactive judicial expansion of the relevant statutory
18 scheme, denying her due process of law.

19 ***Harmless-Error Review***

20 As noted previously, Williams was convicted of violating N.R.S. 484.3795(1)(f)
21 based in pertinent part upon allegedly having a prohibited substance in her blood at the
22 relevant time. The pertinent verdict forms did not distinguish between a conviction based
23 upon the presence of marijuana in her blood and one based upon the presence of
24 marijuana metabolite. The verdicts instead referred in pertinent part to Williams driving
25 and/or being in actual physical control "with a prohibited substance in blood." (*E.g.*, ECF
26 No. 76-7, at 2.) Under the instructions and verdict forms, the jury thus could find Williams
27 guilty on a legally invalid basis, the presence of marijuana metabolite, that denied her due
28 process.

1 A conviction is subject to challenge if the jury may have relied upon a
 2 constitutionally invalid alternative basis for guilt while rendering a verdict that did not
 3 distinguish between that invalid alternative basis and a valid one. See *Hedgpeth v.*
 4 *Pulido*, 555 U.S. 57, 58 (2008). The error is not a structural error, however; and it instead
 5 is potentially subject to review for harmless error. *Id.*, at 60-62. In the present case,
 6 however, respondents have not raised any issue or defense of harmless error as to
 7 Ground 8. It thus would appear that respondents arguably have waived the issue. See,
 8 e.g., *Reyes v. Lewis*, 833 F.3d 1007, 1033 (9th Cir. 2016).

9 The Court in any event concludes that the error was not harmless.

10 On collateral review, the harmless-error standard from *Brecht v. Abrahamson*, 507
 11 U.S. 619 (1993), controls. Under *Brecht*, the record must demonstrate that the error
 12 resulted in actual prejudice. E.g., *Davis v. Ayala*, 135 S.Ct. 2187, 2197 (2015). Federal
 13 habeas relief is appropriate under this standard if the court is left with grave doubt as to
 14 whether the trial error had a substantial and injurious effect or influence in determining
 15 the jury's verdict. *Id.*, at 2198. *Brecht* requires more than a reasonable possibility that
 16 the error might have contributed to the conviction, and the court instead must find that the
 17 defendant sustained actual prejudice from the error. *Id.*⁷

18 Where a jury has been presented with both valid and legally invalid alternative
 19 bases for conviction, harmless-error review does not consist of reviewing merely for
 20 sufficiency of the evidence on the valid alternative. See, e.g., *Riley v. McDaniel*, 786 F.3d
 21 719, 725-26 (9th Cir. 2015). Thus, a demonstration only that evidence exists which
 22 rationally could be viewed as supporting the valid alternative theory "is not enough to
 23 establish that the error was harmless." *Id.*, at 726. Rather, "the relevant question is 'not
 24 simply whether [the reviewing court] can be reasonably certain that the jury *could* have

25 ⁷ The *Brecht* harmless-error standard applies on federal habeas review regardless of whether the
 26 court's review is *de novo*, as it is here, or instead is deferential review under AEDPA. E.g., *Kirkpatrick v.*
 27 *Chappell*, 950 F.3d 1118, 1128-29 (9th Cir. 2020). On deferential review, the *Brecht* standard subsumes
 28 any question as to whether a state court's harmless-error determination under *Chapman v. California*, 386
 U.S. 18 (1967), was objectively unreasonable. In the present case, the state supreme court did not reach
 the merits and further made no such harmless-error determination; and this Court thus simply applies
Brecht wholly without any such indirect subsumed consideration of the *Chapman* standard.

1 convicted . . . based on the valid theory . . . ,’ but whether ‘[the reviewing court] can be
2 reasonably certain that the jury *did* convict . . . based on the valid . . . theory.” *Id.* (citing
3 prior authority, with emphasis in the original authority).⁸ That is, the question is not
4 whether the jury could have convicted the defendant under a valid alternative theory
5 based on the evidence presented, but instead is whether the reviewing court can be
6 reasonably certain that the jury did convict her based on the valid theory. *Id.*

7 In the present case, the defense was able to raise a fairly substantial question for
8 the jury at trial as to whether the State’s evidence in fact established that the requisite
9 amount of the active ingredient of marijuana was present in Williams’ blood at the relevant
10 time. In contrast, the defense’s own evidence instead ultimately tended to confirm that a
11 requisite amount of marijuana metabolite was present (if marijuana metabolite otherwise
12 validly had constituted a prohibited substance under the definition in N.R.S. 484.1245 at
13 the relevant time).

14 Three blood draws were taken at roughly thirty-minute intervals by a hospital
15 trauma room nurse. Two vials of blood were drawn in each draw and then retained in an
16 evidentiary kit. The next day, a vial from each draw was tested for the police by an outside
17 laboratory, Associated Pathologist Laboratories (APL). The second vial from each draw
18 was additionally retained for possible later testing, such as for testing by the defense.
19 (See, e.g., ECF No. 75-11, at 30-31, including the stipulation at 30; ECF No. 75-19, at 6-
20 9; ECF No. 75-22, at 14-15; ECF NO. 75-25, at 7-8.)

21 APL obtained values from the three vials of blood tested, in the order that they
22 were drawn originally, of 5.5, 5.1, and 4.8 nanograms per milliliter respectively for the
23 active ingredient of marijuana, delta-9 tetrahydrocannabinol (THC). These values all
24 exceeded the 2 nanogram minimum value for marijuana set forth in N.R.S. 484.379(3).
25 (ECF No. 75-11, at 31-32; ECF No. 75-19, at 41.)

26
27 ⁸ The prior authority, *Babb v. Lozowsky*, 719 F.3d 1019 (9th Cir. 2013), was overruled on other
28 grounds, as recognized in *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014). *Babb* otherwise remains
good law. See, e.g., *Kieren v. Nevada Attorney General*, No. 11-17815, 584 Fed.Appx. 305 n.1 (9th Cir.
Sept. 22, 2014).

1 APL obtained values from the three sample vials, in the same order, of 62, 57, and
2 52 nanograms per milliliter respectively for an inactive metabolite of marijuana, delta-9
3 THC carboxylic acid (carboxylic acid).⁹ These values all well exceeded the 5 nanogram
4 minimum value for marijuana metabolite set forth in that particular statute (for a situation
5 where marijuana metabolite constituted a prohibited substance under the statutory
6 definition in N.R.S. 484.1245 at the relevant time). (ECF No. 75-11, at 31-32; ECF No.
7 75-12, at 15-16 & 23; ECF No. 75-19, at 20-21; ECF No. 75-25, at 6.)

8 The defense presented expert testimony seeking to establish, *inter alia*, that APL's
9 THC values were not reliable because APL had not run adequate known control samples
10 to assure that the lab's test equipment was calibrated and functioning properly at the time
11 of its analysis. The expert testified that a proper protocol would have involved running
12 three known control samples with values of 1, 5 and 10 nanograms per milliliter
13 respectively that were close to the range of values expected to be obtained from the
14 forensic samples from Williams' blood that were to be tested. APL instead ran only a
15 single control of a known THC sample with 20 nanograms per milliliter, well above the
16 expected values from the forensic samples. (ECF No. 75-22, at 17-21; ECF No. 75-25,
17 at 10-12.)

18 The single control run by APL for carboxylic acid also was at 20 nanograms per
19 milliliter. However, unlike the THC control, this control amount was not far above the
20 expected values. Rather, the tested values obtained for the forensic samples for the
21 metabolite far exceeded rather than came in well below the control level as had been the
22 case with APL's testing instead for THC. (See ECF No. 75-25, at 11.)

23 The defense additionally had a second lab – the Center for Human Toxicology at
24 the University of Utah (CHT) – independently test all six vials, including both the original
25 three vials previously tested by APL and the three vials reserved for possible defense
26 testing. (ECF No. 75-22, at 12-16 & 20-24; ECF No. 75-25, at 10-11.)

27 ⁹ Different expert and other witnesses used different shorthand references for carboxylic acid, after
28 clearly identifying the metabolite in their testimony. The Court uses the one shorthand reference throughout
herein for consistency and clarity.

1 The values for THC obtained by CHT for the six vials all were below the 2
2 nanogram threshold required by N.R.S. 484.379(3) for marijuana. CHT obtained test
3 values of (a) 1.4 nanograms per milliliter for the previously-tested vial from the first blood
4 draw, and 0.9 nanograms for the untested vial; (b) 0.0 nanograms per milliliter for the
5 previously-tested vial from the second blood draw, and 0.7 nanograms for the untested
6 vial; and (c) 1.3 nanograms per milliliter for the previously-tested vial from the third blood
7 draw, and 0.5 nanograms for the untested vial. (ECF No. 75-22, at 22-23.)

8 While the THC values in the CHT testing all were below the 2 nanogram threshold,
9 the CHT testing was conducted approximately ten months after the blood samples were
10 taken. APL had not refrigerated or frozen the samples in the meantime. Defense and
11 prosecution expert testimony debated back and forth at trial as to, *inter alia*, whether the
12 samples should have been refrigerated, the prospect that the THC in an unrefrigerated
13 sample could degrade – substantially – during that interval under the limited research at
14 the time, the extent to which that that research further was qualified by the fact that the
15 samples in the research used blood “spiked” directly with THC in the lab rather than blood
16 where the THC had been incorporated into the blood sample naturally following smoking
17 marijuana, and, ultimately, the extent to which the lower CHT values were attributable to
18 such possible degradation of the THC over time rather than other factors such as CHT
19 using an allegedly better control protocol than APL. (See, e.g., ECF No. 75-22, at 25-30;
20 ECF No. 75-25, at 8-9, 12, 14, 15 & 19-20; ECF No. 75-26, at 16-18 & 20-24.)

21 In contrast, the CHT test results for the metabolite carboxylic acid included, with
22 exceptions, multiple readings above the 5 nanogram threshold set forth in N.R.S.
23 484.379(3) (for situations where the metabolite further qualified as a prohibited substance
24 under the definition in N.R.S. 484.1245). CHT obtained test values of (a) 54.5 nanograms
25 per milliliter for the previously-tested vial from the first blood draw, and 10.2 nanograms
26 for the untested vial; (b) “not detected” for the previously-tested vial from the second blood
27 draw, and “unreported” for the untested vial; and (c) 36.9 nanograms per milliliter for the
28 previously-tested vial from the third blood draw, and 3.6 nanograms for the untested vial.

1 The expert who presented the CHT test results opined that the “unreported” or “not
2 determined” result as to the second, previously untested vial from the second draw “was
3 inconclusive, because it was a poor signal.” But he was confident in the accuracy of the
4 remaining test values (including those as to THC content). (ECF No. 75-22, at 23-24 &
5 28-29; see *also* ECF No. 75-25, at 14.) Significantly, carboxylic acid was not affected by
6 possible degradation during room-temperature storage at the very least to the same
7 substantial potential extent as THC. (ECF No. 75-25, at 11; ECF No. 75-26, at 16.)

8 Defense forensic toxicology expert Dr. Michael Peat, Ph.D, opined that none of the
9 test results – as to either THC or carboxylic acid – by either lab were reliable given the
10 wide variability between and within all of the sundry test results by the two labs. (ECF
11 No. 75-25, at 17; ECF No 75-26, at 23.)

12 The trial court instructed the jury that both marijuana and marijuana metabolite
13 constituted a prohibited substance when found in the blood in an amount equal to or
14 greater than 2 nanograms and 5 nanograms per milliliter respectively. The instructions
15 did not direct the jury to consider whether a sufficient amount was present of either
16 substance in any particular order. The jury thus could consider either substance first, and
17 jurors therefore did not have to consider the other substance if they found that a sufficient
18 amount was present of the substance that they considered first. (See ECF No. 76-6, at
19 18 & 21.)

20 During the State’s initial closing argument, the prosecution, *inter alia*, noted that
21 the requisite amount of THC was present based upon the 5.5 nanogram per milliliter APL
22 lab result exceeding the 2 nanogram threshold for marijuana. The prosecution further
23 emphasized, however, that “THC was not the only substance tested for” and that the 62
24 nanogram per milliliter APL lab result for marijuana metabolite was “well in excess of what
25 is required by the statute” of 5 nanograms per milliliter. (ECF No. 76-2, at 17-18.)

26 In the defense closing, Williams’ counsel argued, *inter alia*, that the APL forensic
27 test values for THC were not reliable because the lab had used only the single 20
28 nanogram per milliliter control that was far above the expected possible values from the

1 forensic samples. Counsel further relied on Dr. Peat's opinion generally that all of the
2 test results by both labs were unreliable given the wide test values obtained, and he
3 challenged the lack of specifics as to testing procedures in the prosecution testimony
4 introducing the APL test results. Counsel otherwise did not make any specific argument
5 challenging the validity of the carboxylic acid test values standing alone. He instead
6 stated that the statute allowed conviction based upon five nanograms of metabolite, which
7 he asserted "doesn't even have any effect on an individual," with counsel then urging that
8 "[i]t's a very unfair law." The State's objection to this argument was sustained, and the
9 court instructed the jury essentially that it was to apply the law as set forth in the court's
10 instructions. (ECF No. 76-2, at 29-30; ECF No. 76-3, at 2-5.)

11 In the State's rebuttal argument, the prosecution, *inter alia*, referred again to the
12 APL test values for both THC and carboxylic acid, which all substantially exceeded the
13 respective 2 and 5 nanogram per milliliter statutory threshold amounts. The prosecution
14 further argued in support of the validity of the APL test values. Thereafter, the prosecution
15 referenced the CHT test values for carboxylic acid from the first and third blood draws,
16 emphasizing the following:

17 Even if you look at their tests, ten months later, if you
18 look at the carboxy THC [*i.e.*, carboxylic acid] when they
19 retested, 36.9. It's still 12 times – not quite 12 – about five,
20 six times over five nanograms per milliliter [sic] on the
21 carboxy.

22 The marijuana metabolite was still there.

23 On the other test that they did, it came out to . . . 10.2.
24 First sample, third sample, they came out 10.2.

25 Even if you use the defense's numbers, we're at least
26 double five nanograms per milliliter on the metabolite, and –
27 and on one instance, we're five times – six times – seven
28 times the metabolite. (Indicating)

So whether you use their science or APL's science, it
comes out the same. We'd submit that they're entirely
consistent.

(ECF No. 76-3, at 10-13.)

1 The trial judge sent the jury home for the night after closing arguments. (ECF No.
2 76-3, at 15.) Starting the next day, the jury deliberated for one full day and then into the
3 middle of the following morning. (ECF Nos. 76-5, at 2-7 & 16-18.)

4 Over the course of the first day of deliberations, the jury asked several questions.
5 (ECF No. 76-5, at 2-7.) The first set of questions included a request for clarification of the
6 meaning on the verdict form of, *inter alia*, “with a prohibited substance in blood resulting
7 in death of” the victim. (*Id.*, at 3-5.) The trial judge responded in open court:

8 Okay, ladies and gentlemen, as to that, I need to refer
9 you to the jury instructions, which collectively define the law
and you need to read those instructions then.

10 (*Id.*, at 5.)

11 Meanwhile, before being brought in for the responses to the first set of questions,
12 the jury inquired further. The jury asked, *inter alia*, whether, for the defendant to be found
13 guilty under the prohibited-substance potential alternative basis for culpability, she must
14 “have violated all five statements” in Instruction No. 6, which stated the elements for that
15 alternative basis for liability. (*Id.*, at 6; see also ECF No. 76-6, at 18.) Thereafter, in
16 addition to responding regarding the elements overall, the court stated as follows
17 regarding the prohibited substance element in particular:

18 As to subpart two, it refers to marijuana or marijuana –
19 or marijuana metabolite. It can be either or the other, one or
20 the other, but it must be found by the jury beyond a reasonable
doubt as to one or the other.

21 (*Id.*, at 6.)

22 The court then told the jury in response to another question, requesting clarification
23 regarding the impairment alternative, also that the jurors must read the instructions to
24 answer that question. The jury immediately asked back in writing, while still in the
25 courtroom: “If we go back and read our instructions and are still confused, what next?”
26 To which the judge responded: “Ladies and gentlemen, the answer to that question is:
27 You reread the instructions.” (*Id.*)

28 ////

1 Given the foregoing record, this Court cannot be reasonably certain that the jury
2 did convict based on the valid marijuana alternative for culpability rather than the
3 constitutionally invalid marijuana metabolite alternative, regarding Williams' convictions
4 based upon driving with a prohibited substance in her blood. Indeed, on the record
5 presented, it was in truth more probable that the jury convicted Williams based on the
6 invalid marijuana metabolite alternative.

7 The jury instructions did not require that the jury consider the valid marijuana
8 alternative prior to considering the invalid marijuana alternative. The trial court's response
9 to the jury's question during deliberations further drove home the point that the jury could
10 consider "either or the other, one or the other," with no particular order being established
11 in which the jury considered either.¹⁰ In that consideration, by finding guilt under the
12 prohibited-substance statute, the jury clearly rejected Dr. Peat's blanket opinion that none
13 of the test results, by either APL or CHT, and as to both marijuana and marijuana
14 metabolite, were reliable. Once having crossed that analytical threshold rejecting Dr.
15 Peat's blanket opinion, the path of least resistance for the trier of fact then was to find
16 Williams guilty based upon the presence of, at the very least, marijuana metabolite,
17 without regard to marijuana itself. There were strenuously disputed issues raised about
18 the APL marijuana test results, including whether that lab used an adequate control
19 protocol. In contrast, there was far less question, once Dr. Peat's blanket unreliability
20 opinion was rejected, as to the validity and reliability of the test results, by either lab, for
21 marijuana metabolite; and multiple test values by both labs came in well in excess of the
22 minimum statutory threshold. As the State ably framed the salient point in its rebuttal
23 argument, "[e]ven if you use the defense's numbers," there was at least twice and as
24 much as several times the required amount of marijuana metabolite, "[s]o whether you
25 use their science or APL's science, it comes out the same."

26 ¹⁰ The presence or absence of an instruction directing the jury to consider a valid alternative prior
27 to what later proved to be an invalid alternative has been a significant factor in determining whether an error
28 was harmless. See, e.g., *Riley*, 786 F.3d at 727 (discussing and distinguishing prior authority that had held
that an error invalidating a premeditation alternative for first-degree murder was harmless where, *inter alia*,
the jury was directed to consider the felony-murder alternative first).

1 On such a record, it was far more probable that the jury convicted Williams based
2 upon the constitutionally invalid marijuana metabolite alternative rather than the valid
3 marijuana alternative. The more natural, and more ready, resolution by a trier of fact on
4 the evidence presented would be to simply find the presence of sufficient marijuana
5 metabolite, without further reaching or attempting to resolve the more strenuously
6 disputed factual issues regarding the presence of sufficient THC in the blood samples,
7 given the presence of an amply sufficient quantity of carboxylic acid even in multiple test
8 results obtained during defense testing.

9 Moreover, the length of the deliberations, and the fact that the jury had multiple
10 questions during their deliberations, including questions specifically about culpability
11 under the prohibited-substance statute, which were not all answered directly, further cut
12 against any finding of harmless error in this case. *See, e.g., United States v. Velarde-*
13 *Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (*en banc*) (lengthy deliberations suggest a
14 difficult case and weigh against a finding of harmless error).

15 This Court thus cannot say with reasonable certainty that the jury *did* rely on the
16 valid marijuana alternative for culpability. The Court accordingly is left with grave doubt
17 as to whether the error had a substantial and injurious effect or influence in determining
18 the jury's verdict; and the Court finds that Williams sustained actual prejudice from the
19 error. The Court therefore holds that the fair-warning violation in this case was not
20 harmless error.

21 Williams accordingly is entitled to relief on Ground 8(a). The Court will grant a
22 conditional writ of habeas corpus under the terms and conditions set forth at the end of
23 this order, subject to the State's ability to retry Williams on the pertinent charges within
24 the timeframe established therein.¹¹

25 ¹¹ While review here clearly is *de novo*, the Court would reach the same outcome even on
26 deferential review under AEDPA. A rejection of Williams' fair-warning claim on the merits by the state
27 courts would have been an objectively unreasonable application of clearly established federal law as
28 determined by the United States Supreme Court, as the state supreme court's judicial expansion of the
relevant statutes was not foreseeable to a person of ordinary intelligence. Further, while the bulk of
Williams' state and federal court argument has been directed instead to Ground 8(b), discussed *infra*, (a)
Ground 8(a) clearly is presented in the amended petition (ECF No. 110, at 44-47); and (b) Ground 8(a) was

Ground 8(b): Denial of Fair Warning by Vagueness

In Ground 8(b), Williams alleges that she was denied due process when she was denied fair warning of the conduct prohibited because the statutory scheme allegedly was unconstitutionally vague. She alleges in particular that the statute was unconstitutionally vague because N.R.S. 484.1245 excluded marijuana metabolite from the definition of prohibited substance while N.R.S. 484.379 allegedly included it. (ECF No. 110, at 47-50.)

Ground 8(b) was presented to the state courts on state postconviction review, and the state supreme court affirmed the rejection of the petition on the basis of procedural default rather than the merits. (See discussion in note 12, *infra*.) Federal habeas review of the merits thus is *de novo* following upon Williams having overcome the procedural default in this Court.

Grounds 8(a) and 8(b) do not present complementary alternative bases for relief but instead are based on mutually inconsistent premises. A claim such as Ground 8(a) is premised upon an unforeseeable judicial expansion of clear and precise statutory language. A claim such as Ground 8(b) is premised upon the relevant statutory language instead being vague as written. While both premises form the basis for a type of fair-warning due process claim, the premises are inherently inconsistent and each thus form the basis for a different type of fair-warning claim. Put simply, the pertinent statutory language of course cannot be both clear and precise and vague on the very same point at issue, such as here whether marijuana metabolite was a prohibited substance at the relevant time. See *generally Bouie*, 378 U.S. at 351-54.

A petitioner of course may allege and pursue inherently contradictory claims in the alternative. However, in terms of deciding the merits of the claims, this Court's holding on Ground 8(a) that the state supreme court unforeseeably ignored clear and precise statutory language theretofore establishing that marijuana metabolite was not a prohibited

exhausted following upon, *inter alia*, the state supreme court's holding that that claim was procedurally barred (ECF No. 98-4, at 11 & 15-17).

1 substance at the relevant time necessarily precludes a holding by the Court on Ground
2 8(b) that the statutory scheme instead was vague.

3 Petitioner's counsel clearly places substantial reliance instead on Ground 8(b), and
4 the federal reply argues Ground 8(b) extensively to the exclusion of Ground 8(a). (See
5 ECF No. 127, at 2-8.) The Court, however, analyzed the fair-warning claim in Ground
6 8(a) substantially the same way that it does now nearly ten years ago prior to the stay.
7 (See ECF No. 78, at 2-7 & 9-10.) The Court has seen nothing in the post-stay argument,
8 including Williams' extensive argument relying instead more on Ground 8(b) that leads it
9 to a contrary conclusion. This Court again strongly encourages any reviewing court to
10 review a physical volume containing the relevant statutes rather than looking at provisions
11 in isolation on a computer screen. At bottom, the statutory scheme involved was clear,
12 precise and in truth simple; and the state supreme court unforeseeably expanded that
13 clear and precise statutory language.

14 A critical flaw in petitioner's argument under Ground 8(b), as well as with the state
15 supreme court's analysis, follows from improperly treating N.R.S. 484.379 as a statute
16 defining "prohibited substance." That statute contained no such definition and instead
17 only established the amounts required to sustain a conviction where a substance
18 otherwise qualified as a prohibited substance. There was only one controlling statutory
19 definition of prohibited substance, in N.R.S. 484.1245; and marijuana metabolite did not
20 satisfy that definition at the relevant time. It is and was that simple, to a person of ordinary
21 intelligence reading the statutory language, as a whole, along with prior jurisprudence at
22 the relevant time.

23 Moreover, there was no contradictory vagueness – with one provision allegedly
24 excluding marijuana metabolite and another allegedly including it – in the relevant statutes
25 *as written*. N.R.S. 484.1245, *as written*, did not categorically exclude marijuana
26 metabolite as a prohibited substance. If marijuana metabolite had been listed in the
27 relevant schedules, then N.R.S. 484.1245 would have *included* marijuana metabolite as
28 a prohibited substance and there would have been no alleged conflict between N.R.S.

484.1245 and N.R.S. 484.379. Thus, taking Williams' vagueness theory to its in truth illogical conclusion, the statutes would have been vague and in conflict if marijuana metabolite was not listed in the relevant schedules but would have not been vague and in conflict if the metabolite instead was listed in the relevant schedules. That illogical conclusion drives home the point that the true problem here is not any vagueness in the statutes as written. As written, the statutes were clear and not in conflict. The matter of whether marijuana metabolite was or was not listed in the relevant schedules was a subsequent and independent condition that had nothing to do with the clarity or vagueness of how the statutes read on their face. Clearly, precisely – and simply – if marijuana metabolite was listed in the schedules it was prohibited substance; and it was not a prohibited substance if it was not so listed. The true problem here is that the Supreme Court of Nevada read the clear and precise limiting language in N.R.S. 484.1245 out of that statute. That is a judicial expansion issue, not an issue of vagueness in the statutes as written.

Ground 8(b) does not provide a basis for federal habeas relief. Ground 8(a) instead is the correct basis for the grant of habeas relief here.¹²

¹² Before turning from Ground 8, the Court recaps the state and federal procedural history relevant to exhaustion and procedural default issues as to Grounds 8(a) and 8(b), as there have been varying and inconsistent statements in this regard during the extended state and federal litigation.

In her first state postconviction petition, litigated by her trial counsel, Williams alleged only that her conviction violated due process because one of the two possible bases for her conviction was invalid as a matter of law because marijuana metabolite did not satisfy the definition of a prohibited substance under N.R.S. 484.1245. She based the due process claim on *Griffin v. United States*, 502 U.S. 46 (1991), and *Leary v. United States*, 395 U.S. 6 (1969). Williams did not include a claim corresponding to current Ground 8(a) that she was denied fair warning by a judicial expansion of the statute, which, indeed, had not occurred yet as of that point. (ECF No. 76-18, at 7-8 & 12-15; ECF No. 76-21, at 5-9 & 14-15.)

It is subject to question whether *Griffin* and *Leary* in fact establish a freestanding due process claim as opposed to merely addressing the consequence of an alternative basis for culpability under a general verdict being otherwise legally invalid for one reason or another. The *Pulido* decision discussed in the text *supra* clearly limits any expansive reading of *Griffin* and *Leary* in that regard. *Pulido* requires that any such situation involving an invalid alternative basis of culpability must be reviewed for harmless error as opposed to reversal being automatic. In all events, the salient point regarding exhaustion is that the purported "*Griffin-Leary*" substantive claim presented in the first state petition was not the same claim presented in Ground 8(a) of a deprivation of due process due to a denial of fair warning from a judicial expansion of the relevant statutes.

(note continued)

1 The fact that a judicial-expansion claim corresponding to Ground 8(a) had not been presented in
2 the first state petition was the reason why this action ultimately was stayed in 2011. (See ECF No. 78, at
3 5-6, 8 & 10.) Williams did present the claim in federal court. (ECF No. 24, at 39-40; ECF No. 24-2, at 1-2.)

4 In the second state postconviction proceeding, Williams initially raised, *inter alia*, a pure judicial-
5 expansion claim corresponding to current Ground 8(a). (See ECF No. 99-1, at 118-21; ECF No. 99-2, at
6 28.) The State responded to the claim from the outset as if it instead were a vagueness claim, which as
7 discussed in the text is a different claim. (See ECF No. 100, at 99-118.) Thereafter, over the course of the
8 proceedings, Williams articulated also the actual vagueness claim that forms the basis of current Ground
9 8(b), *i.e.*, that one statutory provision excluded and another instead included marijuana metabolite as a
10 prohibited substance. At times, the in truth mutually exclusive Ground 8(a) judicial-expansion and Ground
11 8(b) vagueness claims were to an extent intermixed with one another in Williams' argument. One and then
12 the other claim would have more prominence in successive filings, without any distinction being made
13 between the two mutually exclusive claims. (See, e.g., ECF No. 100-1, at 60-63 & 69-70; ECF No. 102-4,
14 at 6-7 & 9-13; ECF No. 102-2, at 2-5; ECF No. 101-3, at 9-13; ECF No. 101, at 6-7, which have been
15 reordered into chronological order.) Williams had presented vagueness arguments in prior state court
16 proceedings, but she had not presented the vagueness claim in Ground 8(b) in any such prior proceedings.
17 (See ECF No. 76-12, at 22-24; *Williams I*, 118 Nev. at 545-47, 50 P.3d at 1122-23.) Statements in the state
18 court, by both sides, that would suggest to the contrary are incorrect. (See, e.g., ECF No. 100, at 107-11;
19 ECF No. 101-3, at 16-17.) Ground 8(b) was not presented until the second state proceedings.

20 In its order of affirmance on the final postconviction appeal, the Supreme Court of Nevada expressly
21 took up a purely judicial-expansion claim corresponding to Ground 8(a) and rejected that claim as
22 procedurally defaulted. (ECF No. 98-4, at 11 & 15-17.) Ground 8(a) thus is exhausted.

23 Williams also clearly presented a vagueness due process substantive claim corresponding to
24 Ground 8(b) to the state district court and state supreme court while litigating the second state petition.
25 (See above record cites.) The state supreme court affirmed the denial of that petition as procedurally
26 barred, without exception as to any claim. (ECF No. 98-4, at 2-3, 11 & 18.) Ground 8(b) thus is exhausted.

27 In its more recent ruling on respondents' motion to dismiss, this Court – in contrast to the description
28 of the claims herein – described Ground 8(a) as a claim under *Griffin* and *Leary* arguing “that marijuana
metabolite, carboxylic acid, is not listed in the drug schedules and, therefore, was not a prohibited
substance as defined in NRS 484.1245 at the time of the alleged offense.” (ECF No. 116, at 5.) And the
Court described Ground 8(b) as a claim that Williams was denied fair warning by a judicial expansion of the
statute, *i.e.*, as a claim corresponding to Ground 8(a) as analyzed herein. (*Id.*, at 5-6.) These descriptions
were incorrect. As discussed in the text, Ground 8(a) instead is based on judicial expansion; and Ground
8(b) is based upon a vagueness theory, with those two alternatives being mutually exclusive.

Having so described the two claims, the Court further stated in the prior order that Ground 8(a)
“was first argued to the Nevada Supreme Court when the State appealed the grant of Williams' first state
postconviction petition.” (*Id.*, at 6.) That statement was correct as to the claim described as Ground 8(a)
in that order, but it is not correct as to the judicial-expansion claim discussed herein as Ground 8(a). Again,
the reason for the stay was that that judicial-expansion claim – which the Court described in ECF No. 116
as Ground 8(b) – was not exhausted.

The Court further stated in ECF No. 116 that Ground 8(a), as described therein, “is not procedurally
barred and declines to revisit this ruling.” (*Id.*) In all events, the analysis applied in the Court's prior orders
leads to the conclusion that neither the judicial-expansion claim in Ground 8(a) nor the vagueness claim in
Ground 8(b) – as described in this order – are procedurally defaulted under federal law. (See *id.*, at 7-9;
ECF No. 67, at 9-13; ECF No. 78, at 8; ECF No. 133.) The state procedural bar relied upon by the state
high court was not an adequate state law ground in the circumstances presented in this case.

Williams thus has overcome the procedural default of the claims separate and apart from any
reliance also on *Martinez v. Ryan*, 566 U.S. 1 (2012). She thus need not establish ineffective assistance
of first postconviction counsel as cause for a failure to pursue a claim of ineffective assistance of trial
counsel in turn serving as cause for a failure to pursue the substantive claims in Grounds 8(a) & 8(b).

1 **Ground 9: Ineffective Assistance of Counsel**

2 In Ground 9, Williams alleges that she was denied effective assistance of counsel
3 in violation of the Sixth and Fourteenth Amendments when trial and appellate counsel
4 failed to raise the constitutional challenges in Ground 8. (ECF No. 110, at 51-53.)

5 Ground 9 was raised on state postconviction review, and the state supreme court
6 rejected the claim on the basis of procedural default rather than the merits. (ECF No. 98-
7 4, at 11-15.) Federal review of the merits thus is *de novo* following upon Williams having
8 overcome the procedural default in this Court. (See ECF No. 116, at 7-9; ECF No. 133.)

9 On a claim of ineffective assistance of counsel, a petitioner must satisfy the two-
10 pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). She must demonstrate
11 that: (1) counsel's performance fell below an objective standard of reasonableness; and
12 (2) counsel's defective performance caused actual prejudice. On the performance prong,
13 the issue is not what counsel might have done differently but rather is whether counsel's
14 decisions were reasonable from his perspective at the time. The reviewing court starts
15 from a strong presumption that counsel's conduct fell within the wide range of reasonable
16 conduct. On the prejudice prong, the petitioner must demonstrate a reasonable
17 probability that, but for counsel's unprofessional errors, the result of the proceeding would
18 have been different. *E.g.*, *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

19 Trial and direct appeal counsel could not have raised the claim in Ground 8(a) *per*
20 se because the judicial expansion did not occur until the state supreme court's order on
21 appeal on Williams' first state petition. Counsel could have raised the related state-law
22 argument that marijuana metabolite was not a prohibited substance at the relevant time,
23 but the judicial-expansion claim had not yet arisen prior to the later order disregarding
24 N.R.S. 484.1245 in part. It thus does not appear that Williams raises a viable ineffective-
25 assistance claim in this regard. She in any event would not be entitled to greater relief
26 on this aspect of Ground 9 than she is being granted under Ground 8(a) of this order.

27 Ground 9 further alleges that Williams' trial and direct appeal counsel were
28 ineffective for the failure to raise the vagueness challenge raised in Ground 8(b). The

1 Court's holding that Ground 8(b) – as opposed to Ground 8(a) – does not provide a basis
 2 for federal habeas relief also leads to the conclusion that this aspect of Ground 9 does
 3 not present a viable ineffective-assistance claim. This conclusion follows even if the Court
 4 were to assume *arguendo* that Williams' counsel rendered deficient performance by
 5 failing to raise the vagueness challenge at trial and on appeal, in contrast to an argument
 6 in the alternative that marijuana metabolite clearly was not a prohibited substance at the
 7 relevant time under the governing statutory definition. The Court's holding that Williams
 8 is not entitled to relief on Ground 8(b) leads to the conclusion that Williams cannot
 9 establish the requisite prejudice on this aspect of Ground 9.

10 Ground 9 therefore does not provide a basis for habeas relief.

11 The Court now turns to the remaining claims in the amended petition, which are
 12 not at least directly related to the fair-warning claims, starting in order with Ground 1.

13 ***Ground 1: Failure to Refrigerate Blood Samples***

14 In Ground 1(a), Williams alleges that she was denied due process of law in
 15 violation of the Fourteenth Amendment when the State failed to refrigerate blood samples
 16 that were taken and tested following her arrest and thereby failed to preserve their alleged
 17 potential exculpatory value for contradictory testing by the defense. In Ground 1(b),
 18 petitioner alleges that the state trial court erred by holding that she did not satisfy *Leonard*
 19 *v. State*, 117 Nev. 53, 17 P.3d 397 (2001), on this federal constitutional due process
 20 issue. Williams alleges that later exculpatory defense test results were rendered subject
 21 to challenge by the State, based on the State's failure to refrigerate the samples to
 22 preserve their evidentiary value. (ECF No. 110, at 6-19; see *a/so* ECF No. 1, at 9-20.)¹³

23 In its August 2, 2002, published decision on direct appeal, the Supreme Court of
 24 Nevada rejected the federal due process claim presented to that court on the following
 25 grounds:

26 ¹³ With only minor variation primarily as to style or form, Ground 1 in the amended petition filed by
 27 appointed counsel is the same as in the original and amending petitions filed by original counsel. The
 28 omission of material from ECF No. 1, pages 17-18, and ECF No. 24, pages 17-18, from the original and
 amending petitions represents the largest difference in terms of amount of content. The Court has
 redesignated Parts 1 and 2 instead as (a) and (b), which is more consistent with the practice in this District.

1 D. *Destruction of evidence*

2 Williams next contends that her conviction should be
3 vacated because the State failed to preserve her blood
4 sample. Williams raised this argument in a motion to suppress
5 the blood evidence and also claims that the district court
6 committed plain error in refusing to conduct a suppression
7 hearing until the close of trial.

8 1. *Suppression of evidence*

9 In *Arizona v. Youngblood*,^[FN60] the United States
10 Supreme Court held that the state's failure to preserve
11 evidence does not warrant dismissal unless the defendant
12 can show bad faith by the government and prejudice from the
13 loss of the loss of the evidence.^[FN61] We have reached a
14 similar conclusion:

15 [T]he State's loss or destruction of
16 evidence constitutes a due process violation
17 only if the defendant shows either that the State
18 acted in bad faith or that the defendant suffered
19 undue prejudice and the exculpatory value of
20 the evidence was apparent before it was lost or
21 destroyed. Where there is no bad faith, the
22 defendant has the burden of showing prejudice.
23 The defendant must show that "it could be
24 reasonably anticipated that the evidence sought
25 would be exculpatory and material to [the]
26 defense." It is not sufficient to show "merely a
27 hoped-for conclusion" or "that examination of
28 the evidence would be helpful in preparing [a]
defense."^[FN62]

29 Additionally, in *State v. Hall*, we held that a lab's routine
30 destruction of a DUI defendant's blood sample, after a year,
31 did not constitute bad faith.^[FN63]

32 Here, the blood evidence was not lost or destroyed by
33 the State. Instead, without the State's knowledge, the blood
34 sample was stored by an independent lab (APL) in an
35 unrefrigerated location—according to the lab's normal
36 procedures. Williams did not request a retest of her blood
37 sample for over ten months after it was drawn. Upon request,
38 the State stipulated to allow the retest and there is no
evidence that the State delayed the request in any way.

1 The district court concluded that Williams had failed to
2 show that the State acted in bad faith or that the exculpatory
3 value of the blood samples was apparent or material to her
4 defense at the time that it was stored at room temperature.
Nevada case law, as clearly articulated in *Leonard v. State*,
[FN64] supports this conclusion. Williams has failed to
demonstrate how this decision was erroneous.

5 Accordingly, we conclude that the district court properly
6 determined that Williams failed to show the non-refrigeration
7 constituted a due process violation. We also concur with the
8 district court's decision to allow the jury to consider all of the
9 evidence relating to the original test, the retest, the delay in
retesting, and the lack of refrigeration. The jury was free to
weigh the evidence as it deemed appropriate.

10 [FN60] 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d
281 (1988).

11 [FN61] *Id.* at 57-58.

12 [FN62] *Leonard v. State*, 117 Nev. 53, 68, 17
13 P.3d 397, 407 (2001) (citations omitted).

14 [FN63] 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

15 [FN64] 117 Nev. 53, 17 P.3d 397.

16
17 *Williams I*, 118 Nev. at 551-53, 50 P.3d at 1126-27.

18 The state supreme court's rejection of this claim was neither contrary to nor an
19 unreasonable application of clearly established federal law as determined by the United
20 States Supreme Court at the time of the state high court's August 2, 2002, decision.

21 Williams has not directly challenged the recital of the underlying facts on this claim
22 by the Supreme Court of Nevada, and the court's recital thus is presumed to be correct
23 unless shown to be incorrect by clear and convincing evidence. *See, e.g., Sims, supra.*
24 (*See also* text, *supra*, at 19-24, with related discussion of and citation to the state court
25 record.)

26 In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court addressed a
27 claim similarly based upon a failure to refrigerate and preserve the evidentiary value of
28 biological evidence. In that case, the State failed to refrigerate clothing of the child victim

1 that had semen stains from the perpetrator. The defendant urged that he was denied due
 2 process because the State's failure to refrigerate the clothing and preserve the evidentiary
 3 value of the semen samples denied him the opportunity to perform tests on the samples
 4 that he claimed potentially would have eliminated the possibility that he was the
 5 perpetrator. See 488 U.S. at 52-54.

6 The Supreme Court characterized the due process claim presented as one based
 7 upon "the failure of the State to preserve evidentiary material of which no more can be
 8 said than that it could have been subjected to tests, the results of which might have
 9 exonerated the defendant." 488 U.S. at 57. The Court held that "unless a criminal
 10 defendant can show bad faith on the part of the police, failure to preserve potentially
 11 useful evidence does not constitute a denial of due process of law." 488 U.S. at 58. The
 12 Supreme Court stated its "unwillingness to read the 'fundamental fairness' requirement
 13 of the Due Process Clause . . . as imposing on the police an undifferentiated and absolute
 14 duty to retain and to preserve all material that might be of conceivable evidentiary
 15 significance in a particular prosecution." *Id.* When the failure to preserve potentially
 16 relevant evidence "can at worst be described as negligent" and "there [is] no suggestion
 17 of bad faith on the part of the police," then "there [is] no violation of the Due Process
 18 Clause." 488 U.S. at 58.

19 The Supreme Court further expanded upon these principles as follows:

20 First, [*California v. Trombetta*, [467 U.S. 479, 104
 21 S.Ct. 2528, 81 L.Ed.2d 413 (1984)] speaks of evidence whose
 22 exculpatory value is "apparent." 467 U.S., at 489, 104 S.Ct.,
 23 at 2534. The possibility that the semen samples could have
 24 exculpated respondent if preserved or tested is not enough to
 25 satisfy the standard of constitutional materiality in *Trombetta*.
 26 Second, we made clear in *Trombetta* that the exculpatory
 27 value of the evidence must be apparent "before the evidence
 28 was destroyed." *Ibid.* (emphasis added). Here, respondent
 has not shown that the police knew the semen samples would
 have exculpated him when they failed to perform certain tests
 or to refrigerate the boy's clothing; this evidence was simply
 an avenue of investigation that might have led in any number
 of directions. *The presence or absence of bad faith by the
 police for purposes of the Due Process Clause must*

1 *necessarily turn on the police's knowledge of the exculpatory*
2 *value of the evidence at the time it was lost or destroyed. . . .*

3 488 U.S. at 56 n.* (emphasis added).

4 In the present case, the Nevada Supreme Court's rejection of Williams' claim was
5 in full accord with the foregoing principles.

6 At the time that the evidentiary value of the blood samples was compromised
7 through the failure to refrigerate the samples, the police had no knowledge that the
8 evidence *then* was exculpatory – a proposition that remains speculative to this day. The
9 police instead had been informed by the laboratory that the blood samples had tested
10 positive for prohibited substances in the required amounts. Accordingly, the only
11 knowledge possessed by the police when the evidentiary value of the samples was
12 impaired was that the evidence was inculpatory rather than exculpatory.

13 That, quite simply, is the end of the claim. The claim – under clearly established
14 federal law as determined by the United States Supreme Court – never has been a viable
15 one because Williams cannot establish the requisite bad faith on the part of the State.
16 Under that clearly established federal law, “[t]he presence or absence of bad faith by the
17 police for purposes of the Due Process Clause must necessarily turn on the police's
18 knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.”
19 488 U.S. at 56 n.*. Petitioner cannot establish this fundamental prerequisite for the finding
20 of bad faith necessary for a due process violation under controlling Supreme Court
21 precedent. Under that precedent, when the failure to preserve potentially relevant
22 evidence “can at worst be described as negligent” and “there [is] no suggestion of bad
23 faith on the part of the police,” then “there [is] no violation of the Due Process Clause.”
24 488 U.S. at 58.¹⁴

25 ¹⁴ The conclusion that Ground 1 is without merit holds true even if the Court, with the benefit of
26 hindsight here in 2020, and despite the backward-looking nature of deferential review under AEDPA, were
27 to disregard marijuana metabolite as a prohibited substance because of this Court's contemporaneous
28 holding on Ground 8(a) in this order. Prior to the time that the evidentiary value of the blood draw evidence
 was impaired, test results had shown the presence of not only carboxylic acid but also THC in sufficient
 quantities to convict. Thus, even *arguendo* disregarding the carboxylic acid test results, the police had no
 knowledge of the alleged exculpatory value of the blood draw evidence prior to the time that its evidentiary
 value was impaired, because the prior THC results standing alone also were inculpatory at that time.
 Moreover, deferential review under AEDPA is backward-looking. *Pinholster*, 563 U.S. at 181-82. The state

1 Williams' arguments to the contrary are, at best, unpersuasive, and, at worst, beg
2 the question.

3 Williams urges that the blood samples were "constitutionally material" evidence
4 because allegedly it is very difficult to achieve accurate test results for marijuana even in
5 the best of laboratories, the laboratory in question allegedly did not use proper procedures
6 in its testing of the samples, and Williams had no other way than retesting to determine
7 whether the test results were accurate or reliable. She contends that the evidence
8 accordingly was constitutionally material under *Trombetta*. (ECF No. 110, at 6-7.)

9 In *Youngblood*, the Supreme Court specifically rejected such a reading of
10 *Trombetta* that sought to equate potential usefulness or possible exculpatory value with
11 constitutional materiality. The Court stated explicitly that "[t]he possibility that the semen
12 samples *could have* exculpated respondent if preserved or tested is not enough to satisfy
13 the standard of constitutional materiality in *Trombetta*." 488 U.S. at 56 n.* (emphasis
14 added). The clear holding in *Youngblood* is that "unless a criminal defendant can show
15 bad faith on the part of the police, failure to preserve potentially useful evidence does not
16 constitute a denial of due process of law." 488 U.S. at 58. Petitioner thus cannot
17 bootstrap to a due process violation via arguments seeking to demonstrate the potential
18 exculpatory value that the evidence possibly might have had if it had been better
19 preserved for later defense testing. The potential for exculpatory value, *i.e.*, the possible
20 relevancy and materiality of the evidence from an evidentiary standpoint if tested earlier,
21 clearly is insufficient to establish a due process claim.

22 Williams further contends that this case presents "a clear example of textbook bad
23 faith," for ten reasons. (ECF No. 110, at 12.)

24 First, petitioner asserts that the State "knew or should have known" that the blood
25 samples were not being refrigerated but did nothing about it. (*Id.*)

26
27 _____
28 supreme court's decision on this claim thus must be reviewed in the context of the record and law at the
time of its August 2, 2002, decision. *Id.* At that time, Williams had not yet even raised the state law
argument that marijuana metabolite did not constitute a prohibited substance under the definition in N.R.S.
484.1245.

Williams does not identify any evidence supporting the bald assertion that the State had actual knowledge that the blood samples were not being refrigerated. The state supreme court's order instead found that "without the State's knowledge, the blood sample was stored by an independent lab (APL) in an unrefrigerated location." *Williams I*, 50 P.3d at 1126. Petitioner, who has the burden of proof on federal habeas review, has not demonstrated that the state supreme court's factual determination was an unreasonable one nor has she overcome the presumption of correctness attached to that factual finding.¹⁵

In this same general vein, Williams asserts that the laboratory "was reprimanded by the College of American Pathologists for substandard testing," referring to a "report issued by the College of American Pathologists" as to which the state supreme court denied a motion to expand the record. (ECF No. 110, at 6 & n.3.) However, the actual exhibit in question is a letter to defense counsel from the College of American Pathologists responding to an inquiry that he raised after trial. (ECF No. 24-2, at 5.)¹⁶ The letter reflects that, following counsel's inquiry, the laboratory had agreed, *inter alia*, to thereafter store all specimens in refrigerated, limited-access, secure storage facilities. The accrediting body accordingly "determined not to take further action with respect to APL." The letter is dated September 17, 2001, a year-and-a-half after the laboratory had received and processed the Williams blood samples. The letter does not show any

¹⁵ The deference accorded to state factual findings on federal habeas review applies as well to factual findings made by state appellate courts. See, e.g., *Sumner v. Mata*, 455 U.S. 591, 592-93 (1982); *Ali v. Hickman*, 584 F.3d 1174, 1180-81 (9th Cir. 2009); *Estrada v. Scribner*, 512 F.3d 1227, 1236 (9th Cir. 2008). Williams maintains that the laboratory was an agent of the State. (E.g., ECF No. 110, at 7.) However, she cites no apposite and controlling Supreme Court precedent on the books at the time of the state supreme court's August 2, 2002, decision that required the state court to find, in applying the law specifically under *Youngblood*, that the State knew what the lab knew as to how the samples were stored. This Court's review of Ground 1 is not *de novo* but instead is deferential review looking back to the state of United States Supreme Court law as of August 2, 2002.

¹⁶ It is subject to question whether the letter may be considered on federal habeas review under *Pinholster*. The letter was not part of the trial evidence, and it does not appear that the letter otherwise was part of the lower court record presented on direct appeal. The state supreme court's decision declining to make the letter part of the record on direct appeal – at a point after Williams' principal brief already had been filed – perhaps may be the end of the matter with regard to inclusion in the state court record properly reviewed in federal court on Ground 1 under AEDPA. In any event, even if considered herein, the letter does not lead to a different outcome for the reasons discussed in the text.

1 relevant knowledge by the State regarding the lab's practices in March 2000. Nor, in all
2 events, does the letter reflect the knowledge that is required to show bad faith under
3 *Youngblood*, i.e., "the police's knowledge of *the exculpatory value of the evidence* at the
4 time it was lost or destroyed." 488 U.S. at 56 n*(emphasis added).

5 Moreover, to the extent that Williams relies on the assertion that the State "should
6 have known" that the blood samples were not being refrigerated, she runs directly afoul
7 of *Youngblood*. The Court expressly held in *Youngblood* that negligence does not give
8 rise to a due process violation. 488 U.S. at 58. Petitioner's reliance upon a constructive
9 knowledge "should have known" standard therefore is misplaced. Moreover, again, the
10 knowledge required for a due process violation is not of possible flaws in laboratory
11 procedures but instead is "of the exculpatory value of the evidence at the time it was lost
12 or destroyed." 488 U.S. at 56 n.* (emphasis added).

13 Second, Williams urges that the State was in bad faith because the State already
14 had obtained its blood test results prior to the failure to refrigerate the samples and "clearly
15 gained every advantage in preventing" petitioner from effectively retesting the samples.
16 (ECF No. 110, at 12.)¹⁷ Nothing in *Youngblood* looks to whether the State allegedly
17 secured an advantage at trial from the failure to preserve the evidence in determining
18 whether the State acted in bad faith in failing to preserve the evidence. The *Youngblood*
19 Court noted that the State in that case had not attempted to make any use of the materials
20 in question in its case in chief. 488 U.S. at 56. But the Court did not make that point a
21 factor in its determination of bad faith. See *id.* Again, the relevant inquiry under
22 *Youngblood* is whether the State knew of the – actual not merely speculative –
23 exculpatory value of the evidence at the time that it was lost or destroyed. Merely
24 distinguishing a Supreme Court decision on some basis does not make a state court's
25 application of the decision an objectively unreasonable one. Moreover, the jury in
26 Williams' case was presented with evidence regarding the circumstances surrounding the

27 _____
28 ¹⁷ The state court record does not reflect that the State ever opposed, obstructed or delayed a
defense request specifically to test the samples.

1 original test, the failure to refrigerate the samples, and the effect that this had on the
2 defense's ability to challenge the original test with an effective retest.

3 Third, Williams asserts that the State was in bad faith because the State's testing
4 of the samples allegedly was unscientific. (ECF No. 110, at 12.) Nothing in *Youngblood*
5 looks to whether the State's testing of lost or destroyed evidence was sufficiently scientific
6 in determining whether the State was in bad faith in thereafter failing to preserve the
7 evidence. Cf. 488 U.S. at 59 ("the police do not have a constitutional duty to perform any
8 particular tests"). To the extent that Williams relies upon statements taken out of context
9 from *Trombetta*, the state supreme court was not objectively unreasonable in following
10 the Supreme Court's clear and express holding in *Youngblood* that, under its prior
11 authority in *Trombetta*, "[t]he presence or absence of bad faith by the police for purposes
12 of the Due Process Clause must necessarily turn on the police's knowledge of the
13 exculpatory value of the evidence at the time it was lost or destroyed. 488 U.S. at 56 n.*.

14 Fourth, much like her second argument, Williams contends that the State was in
15 bad faith because the State used the blood test results against her at trial, unlike in
16 *Youngblood* where the State also was unable to obtain any significant evidentiary value
17 from the semen samples. (ECF No. 110, at 12.) On federal habeas review, however,
18 petitioner must do more than merely distinguish a prior Supreme Court opinion in some
19 respect in order to obtain relief. Petitioner instead must demonstrate that the state
20 supreme court's decision rejecting her claim was either contrary to or an unreasonable
21 application of the prior Supreme Court precedent. Merely distinguishing the opinion on
22 some basis not central to the Supreme Court's holding is insufficient to carry this burden.
23 The holding in *Youngblood* as to bad faith turned upon whether the police had knowledge
24 of the exculpatory value of the evidence prior to its loss or destruction, not upon whether
25 the State obtained inculpatory test results prior to the loss or destruction of the evidence.

26 Fifth, Williams contends that the State was in bad faith because petitioner was
27 denied a "*Youngblood* instruction" at trial. (*Id.*) Nothing in the *Youngblood* majority
28 opinion's analysis hinges the State's good or bad faith upon whether the defendant is

1 given such an instruction at trial. *Cf.* 488 U.S. at 54 (noting the instruction only in the
2 factual summary). An opinion by Justice Stevens concurring in the judgment relied in part
3 upon the fact that the jury had been instructed that a negative inference could be drawn
4 from the State's failure to preserve the evidence. See 488 U.S. at 59-60. However, there
5 were five justices in the majority in *Youngblood*, such that Justice Stevens' views in his
6 separate opinion do not circumscribe or qualify the majority opinion. Petitioner must
7 demonstrate that the state supreme court's decision was contrary to or an unreasonable
8 application of the holdings of the United States Supreme Court, not contrary to or an
9 unreasonable application of a separate opinion written by a single justice.¹⁸

10 Sixth, Williams contends that the State was in bad faith because her expert was
11 never given the opportunity to test a valid biological sample, allegedly unlike *Youngblood*.
12 (ECF No. 110, at 12.) This purported distinction is a false distinction. In *Youngblood*, the
13 defense expert did *not* have an opportunity to test a valid biological sample because the
14 police failed to refrigerate the child's clothing with the semen samples. Just as Williams
15 alleges occurred in the present case, the biological sample became available to the
16 defense expert for testing only after it had lost its evidentiary value through the failure to
17 refrigerate the evidence. See 488 U.S. at 58 ("the evidence – such as it was – was made
18 available to respondent's expert who declined to perform any tests on the samples"). That
19 was the very point in *Youngblood*, that the evidentiary value of the evidence was lost
20 before the defense could conduct testing in an effort to develop exculpatory evidence.
21 The Supreme Court held in that circumstance that proof was required that the police knew
22 of the exculpatory value of the evidence before it was lost or destroyed. Here, just as in

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24 ¹⁸ Moreover, Williams did not request the instruction that was used in *Youngblood*. In that case,
25 the jury was instructed: "If you find that the State has . . . allowed to be destroyed or lost any evidence
26 whose content or quality are in issue, you may infer that the true fact is against the State's interest." 488
27 U.S. at 59-60. Williams requested that her jury instead be instructed: "The State has a duty to preserve
28 evidence which may be exculpatory as to the defendant. If you find that the State has failed to preserve
such evidence, the defendant is entitled to a verdict of not guilty." (ECF No. 76-2, at 13.) That charge was
not given in *Youngblood*, and *Youngblood* clearly does not support a jury instruction directing a verdict of
acquittal if the State fails to preserve evidence which only "may be" exculpatory. Williams thus was not
denied "a *Youngblood* instruction," and the good or bad faith of the State in all events does not turn upon
whether the jury was given such an instruction under the analysis in the majority opinion in *Youngblood*.

1 *Youngblood*, mere speculation that testing of refrigerated evidence may have exonerated
2 the defendant is insufficient to establish a due process violation. The false distinction
3 relied upon by Williams in this regard between *Youngblood* and the present case merely
4 further underscores that there is no due process violation in this case under the directly
5 apposite holding in *Youngblood*.

6 Seventh, in this same vein, Williams urges that the State was in bad faith because,
7 at the time of her district-court arraignment on May 22, 2000, “all possibility of valid
8 retesting was destroyed because the State failed to preserve the blood.” (ECF No. 110,
9 at 7 & 12.) Petitioner in part is responding in this regard to the statement by the Supreme
10 Court of Nevada that she not did request a retest of her blood sample for over ten months
11 after it was drawn. Petitioner posits that she would not have been able to effectively retest
12 the blood samples even at the time of her district-court arraignment because the
13 evidentiary value of the samples for retesting allegedly already had been lost by that time.
14 However, the Supreme Court did not hinge its holding in *Youngblood* that there was no
15 due process violation upon whether the defense had an effective opportunity to test the
16 biological sample before its evidentiary value was lost. Rather, again, the bad faith inquiry
17 under *Youngblood* turns upon whether the police knew of the exculpatory value of the
18 evidence before it was lost or destroyed. Williams once again is seeking to proceed down
19 an analytical trail that is grounded in argument that lacks any foundation in the Supreme
20 Court’s actual holding in *Youngblood*.

21 Eighth, Williams contends that the State acted in bad faith because the destruction
22 of the evidentiary value of the blood was not “routine,” purportedly unlike *Youngblood*.
23 (ECF No. 110, at 12.) Nothing in *Youngblood* remotely suggests that the Supreme Court’s
24 holding turned upon whether the loss or destruction of the evidence could be described
25 as “routine.” In *Youngblood*, a police criminologist did not examine the child’s clothing
26 and observe the semen stains until over a year after the incident. By that time, because
27 the clothes had not been refrigerated at the outset, the evidentiary value of the biological
28 samples had been lost. 488 U.S. at 54. The Supreme Court specifically refers to what

1 the samples might have shown “had the clothing been properly refrigerated.” *Id.* Again,
2 nothing in the Supreme Court’s opinion suggests either that the failure to preserve the
3 evidentiary value of the biological sample in *Youngblood* was “routine” or that any such
4 “routineness” of the State’s failure to preserve the evidentiary value had any bearing on
5 the Court’s holding. Rather, it appears that *Youngblood* and this case are nearly identical
6 in this respect, given that both *Youngblood* and the present case involve the failure to
7 preserve the evidentiary value of biological evidence through a failure to refrigerate the
8 evidence.

9 Ninth, petitioner contends that the State acted in bad faith because three of the
10 blood vials were for defense retesting. (ECF No. 110, at 12.) Such a fact only shows, at
11 best, negligence on the part of the State, in that provision was made for defense retesting
12 but ineffectively so due to lack of refrigeration of the blood samples. Nothing in
13 *Youngblood* supports a finding of bad faith on the basis that samples were set aside for
14 the defense. Merely setting aside material for defense retesting pursuant to standard
15 procedure after the State obtained inculpatory test results does not signify that the State
16 was aware that defense retesting in fact would be exculpatory before the evidentiary value
17 of the samples was lost.

18 Finally, Williams contends, tenth, that the State acted in bad faith because the
19 State allegedly waited until after she obtained what she thought were exculpatory
20 negative test results to reveal that the samples had not been refrigerated and that the
21 negative test results therefore were invalid. Petitioner posits – with no record support –
22 that the State never would have raised the issue of lack of refrigeration if the retest results
23 had been unfavorable to petitioner. (ECF No. 110, at 12.) The State’s failure to note the
24 lack of refrigeration earlier during the criminal case – and speculation as to what the State
25 would have done if the retest results had been different – have nothing to do with the
26 issue of bad faith under *Youngblood*. Bad faith under *Youngblood* turns upon whether
27 the police knew the exculpatory value of the biological samples before their evidentiary
28 value was lost, not upon any gamesmanship or speculation as to gamesmanship at trial.

At bottom, petitioner's multiple allegations of bad faith in Ground 1 all derive from her counsel's own arguments as to what constitutes "bad faith," not upon any evidence satisfying the standard for bad faith enunciated by the Supreme Court in *Youngblood*. The state supreme court's rejection of a due process claim based upon such arguments clearly was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court as of August 2, 2002.

Petitioner's reliance upon Nevada state cases, including the state supreme court's *Leonard* decision, is misplaced. Petitioner's burden under AEDPA is to demonstrate that the state supreme court's decision rejecting her claim was contrary to or an unreasonable application of clearly established federal law "as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Demonstrating only that the state court's decision was, *arguendo*, inconsistent with one or more state supreme court decisions clearly does not carry that burden. Nor would demonstrating that the decision was, *arguendo*, inconsistent with lower federal court decisions in federal criminal cases, particularly such decisions that predate *Youngblood*, carry that burden. Petitioner posits that Nevada state cases require proof that *either*: (1) the State acted in bad faith: *or* (2) the defendant suffered undue prejudice and the exculpatory value of the evidence was evident before it was destroyed. (ECF No. 110, at 11 & 14.) Any such formulation, however, is not the test applied by the United States Supreme Court in *Youngblood*.¹⁹ Moreover, neither a viable due process nor equal protection claim would be presented simply because the Supreme Court of Nevada allegedly misapplied Nevada law or departed from its past precedents. *See, e.g., Little v. Crawford*, 449 F.3d 1075, 1983 & n.6 (9th Cir. 2006).

Ground 1 therefore does not provide a basis for federal habeas relief, whether as to parts (a) or (b) of the ground.

¹⁹ The Court notes in passing that it does not appear that petitioner in any event satisfied the formulation that she describes. The blood samples had tested positive, not negative, for the requisite amounts of marijuana and marijuana metabolite before their further evidentiary value was lost. The only hoped-for and speculative exculpatory value of the evidence therefore was not evident before its evidentiary value was destroyed. In all events, however, regardless of how the Nevada cases *arguendo* properly should be applied, it is the standard formulated in *Youngblood*, not in any state court case or lower federal court case, that is controlling on federal habeas review under AEDPA on the due process claim.

Ground 4: Equal Protection, Substantive Due Process, Overbreadth & Vagueness

In Ground 4,²⁰ Williams presents four distinct facial constitutional challenges to the Nevada statutes pursuant to which she was convicted. The Court will divide these distinct claims into parts (a) through (d) of Ground 4.²¹

Ground 4(a): Equal Protection

In Ground 4(a), Williams alleges that she was denied equal protection of the laws in violation of the Fourteenth Amendment because, *inter alia*, the relevant state statutes allegedly impermissibly single out allegedly unimpaired drivers with trace amounts of marijuana or its metabolite in their blood or urine who allegedly pose no threat to traffic safety, such that the statute is not rationally related to a legitimate governmental purpose. Petitioner additionally argues that the statutes violate the Equal Protection Clause because they arbitrarily impose a different burden of proof on “non-prescription” marijuana users as opposed to prescription marijuana users. (ECF No. 110, at 26-30.)

In its August 2, 2002, decision on direct appeal, the Supreme Court of Nevada addressed this claim at length, including consideration of the relevant legislative history of the state statutes. The court stated:

²⁰ Ground 2 was dismissed on Williams’ motion after the Court held that the ground was unexhausted. (ECF No. 50; ECF No. 110, at 20.) It does not appear that Williams thereafter sought to exhaust and pursue the claim when the matter later was stayed. The stay order stated that “[w]ith a stay ordered based on the circumstances pertaining to Ground 8, the question of what additional claim or claims should be presented to the state courts is a matter for petitioner to determine when seeking relief in those courts.” (ECF No. 91, at 3.)

The Court dismissed Ground 3 as not presenting a federal claim cognizable in federal habeas review as opposed to a purely state law claim. (ECF No. 116, at 10.) The claim that was presented to the state supreme court was rejected by that court on the merits. *Williams I*, 118 Nev. at 550-51, 50 P.3d at 1125-26 (emphasis in original). The Court notes additionally that Williams cites no apposite decision of the United States Supreme Court holding, at the time of the state supreme court’s decision on the merits on August 2, 2002, that the Due Process Clause mandates that the states consider preexisting negligence by another party to be relevant to the question of whether a defendant’s own conduct was a proximate cause of death or injury in determining culpability under a criminal statute. Absent such authority, Williams would not be able to present a successful claim under AEDPA even if Ground 3 otherwise were cognizable.

²¹ With only minor variation primarily as to style or form, Ground 4 in the amended petition filed by appointed counsel is the same as in the original and amending petitions filed by original counsel. Petitioner’s division of Ground 4 instead into “Part 1” and “Part 2” arguably is not as clear, as there in truth are four separate claims. Moreover, it is the general practice in this District to divide habeas claims into subgrounds by letter rather than by number, referring, for example, to a Ground 4(a) rather than a Ground 4(1).

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A. *Constitutionality of NRS 484.379(3)*

In 1999, the Nevada Legislature enacted NRS 484.379(3), which provides, in pertinent part, that “[i]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway ... with an amount of a prohibited substance in his blood ... that is equal to or greater than” two nanograms per milliliter of marijuana or five nanograms per milliliter of marijuana metabolite. The Legislature also added subsection (f) to NRS 484.379(1). Under that section, a person is guilty of a felony if the person “[h]as a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379” and the person neglects a duty imposed by law while driving that proximately causes the death of or substantial bodily harm to another person.

At a pretrial hearing to consider the constitutionality of the prohibited substance statute, Senator Jon Porter, who initially proposed the legislation, testified that the Legislature intended to create a per se statute similar to the alcohol per se statute. During this hearing, Senator Porter noted that there were twelve different hearings on the bill and that the wording changed during the course of these hearings. The original draft of the bill provided that driving or being in control of a vehicle with “a detectable amount of a controlled substance” constituted a DUI violation. The bill was subsequently amended to include a short list of controlled substances, which were deemed to be prohibited substances, and if found in a driver's system, would constitute a per se DUI violation. In response to concerns over the absence of a defined level of drugs required for a conviction, the bill was amended, where possible, to include the federal standards set by the Substance Abuse and Mental Health Services Administration (“SAMHSA”). SAMHSA is the agency responsible for setting standards for toxicology testing of airline pilots, train engineers, and others who must be tested for drugs under federal law.

Williams challenges the constitutionality of the resulting prohibited substance statute, NRS 484.379(3), on several bases, each of which will be separately addressed.

1. *Equal protection*

Williams first contends that NRS 484.379(3) violates the Equal Protection Clause because it impermissibly treats

1 drivers with proscribed levels of drugs in their systems
2 differently from others. In analyzing equal protection
3 challenges, the appropriate level of judicial scrutiny must first
4 be determined by considering the nature of the right being
5 asserted. Statutes which involve fundamental rights (such as
6 privacy) or which are based on suspect classifications (such
7 as race) are subject to strict scrutiny. Statutes which do not
8 infringe upon fundamental rights nor involve a suspect
9 classification are reviewed using the lowest level of scrutiny-
10 rational basis. Under the rational basis standard, legislation
11 will be upheld so long as it is rationally related to a legitimate
12 governmental interest.

13 In a footnote in Williams' opening brief, she argues that
14 this court should apply a strict scrutiny standard because the
15 "right" to drive is a fundamental right. In the context of a
16 license revocation proceeding, we have previously held that
17 there is no constitutional right to drive; rather, driving is a
18 privilege. Other courts have similarly held that neither driving
19 nor using illicit drugs constitute fundamental rights.[FN12] The
20 appropriate level of scrutiny is thus the rational basis
21 standard. During oral argument, Williams' counsel conceded
22 that rational basis is the appropriate standard of review.

23 [FN12] *State v. Phillips*, 178 Ariz. 368, 873 P.2d
24 706, 709 & n. 5 (Ct.App.1994); *see also Shepler*
25 *v. State*, 758 N.E.2d 966,969 (Ind.Ct.App.2001);
26 *People v. Gassman*, 251 Ill.App.3d 681, 190
27 Ill.Dec. 815, 622 N.E.2d 845, 853 (1993).

28 All statutes are presumed constitutional and the party
attacking the statute has the burden of establishing that the
statute is invalid. The United States Supreme Court has
provided the following guidelines in determining the rational
basis of a statute:

[A] legislature that creates these categories
need not "actually articulate at any time the
purpose or rationale supporting its
classification." Instead, a classification "must be
upheld against equal protection challenge *if*
there is any reasonably conceivable state of
facts that could provide a rational basis for the
classification."

A State, moreover, has no obligation to
produce evidence to sustain the rationality of a
statutory classification. "[A] legislative choice is

1 not subject to courtroom factfinding and may be
2 based on rational speculation unsupported by
3 evidence or empirical data.” . . . Finally, courts
4 are compelled . . . to accept a legislature's
5 generalizations even when there is an imperfect
6 fit between means and ends. A classification
7 does not fail rational-basis review because it “is
8 not made with mathematical nicety or because
9 in practice it results in some inequality.” “The
10 problems of government are practical ones and
11 may justify . . . rough accommodations-
12 [however] illogical . . . and unscientific [the
13 accommodations may be].”[FN14]

14 [FN14] *Heller v. Doe*, 509 U.S. 312, 320-21, 113
15 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations
16 omitted) (emphasis added).

17 The State contends that the prohibited substance
18 statute is rationally related to the State's interest in highway
19 safety and in deterring illicit drug use. We agree.

20 In passing the prohibited substance statute, the
21 Legislature clearly articulated its intent to follow the lead of
22 nine other states and create a per se drug violation[FN15]
23 similar to the alcohol per se statute. The Legislature
24 considered extensive testimony before passing the law and
25 rejected the concerns expressed by those opposed to the law,
26 who argued it lacked a direct correlation between the
27 prohibited drugs in a driver's system and impairment. Since
28 the law was passed in 1999, the Legislature in 2001 had an
opportunity to amend the statute and did not do so, although
other aspects of the DUI statute were amended during the
2001 legislative session.

[FN15] In considering this legislation, the
Legislature received information that nine other
states had already enacted per se drug statutes.
These states included Arizona, Georgia, Illinois,
Indiana, Iowa, Minnesota, Rhode Island, South
Dakota, and Utah. At the time, statutes in
Arizona, Georgia, and Illinois had been
challenged and found to be a proper exercise of
legislative authority. Since then, Indiana and
Iowa have also upheld their per se drug
statutes. *Shepler*, 758 N.E.2d at 969; *Loder v.*
Iowa Dept. of Transp., 622 N.W.2d 513, 516
(Iowa Ct.App.2000). Based on another statute

1 providing for medical use of marijuana, Georgia
2 concluded that as to marijuana, the per se drug
3 statute violated the Equal Protection Clause
4 because it treated legal and illegal marijuana
5 users differently without a rational basis. *Love*
6 *v. State*, 271 Ga. 398, 517 S.E.2d 53, 57 (1999).
7 However, Georgia has subsequently
8 recognized the validity of the statute as applied
9 to drivers with cocaine in their system. See
10 *Carthon v. State*, 248 Ga.App. 738, 548 S.E.2d
11 649, 654 (2001); *Keenum v. State*, 248 Ga.App.
12 474, 546 S.E.2d 288, 289 (2001).

13 We have previously recognized traffic safety as a
14 rational basis for upholding statutes that regulate the use of
15 substances that may impair a person's ability to drive. In
16 considering Arizona's per se drug statute, the Arizona Court
17 of Appeals concluded in *State v. Phillips* that banning driving
18 by persons with any measurable amount of illicit drugs was
19 constitutional because "the legislature was reasonable in
20 determining that there is no level of illicit drug use which can
21 be acceptably combined with driving a vehicle; the
22 established potential for lethal consequences is too great."
23 Likewise, we conclude that the governmental interest in
24 maintaining safe highways is sufficient for our prohibited
25 substance statute to survive a constitutional attack on the
26 basis that it impermissibly treats drivers with the proscribed
27 levels of illicit drugs in their system differently from others.

28 To the extent that Williams' argument is premised on
the distinction made between legal and illegal users of
marijuana, we likewise conclude that it lacks merit. This
portion of Williams' argument is based on language in NRS
484.1245 that exempts substances used by persons with a
valid prescription for that substance from the definition of
"prohibited substances" as used in NRS 484.379(3). Williams
also points to the exclusion of certain parts of the marijuana
plant from the definition of "marijuana" in NRS 453.096 in
asserting there could be "legal" users, as well as the fact that
doctors in Nevada may prescribe Marinol[FN18] to certain
persons.

[FN18] Marinol is a drug containing one of the
active ingredients in marijuana.

The State contends that Nevada did not recognize any
lawful users of marijuana at the time of Williams' collision or
conviction.[FN19] In addition, the State contends that even if

1 such a distinction existed, it would be rationally related to a
2 legitimate state objective in deterring illicit drug use. We
agree.

3 [FN19] Though Nevada voters in the 2000
4 election approved a referendum authorizing the
Legislature to draft a medicinal marijuana
5 statute, the referendum was passed after
Williams' collision and such a statute has not yet
6 been enacted.

7 The Legislature could have reasonably determined that
8 illegal use of a substance poses a greater threat to the public
- and therefore warrants a harsher punishment - because
9 unlike prescribed use, illegal use of drugs is not controlled.
Specifically, a prescription is generally for a drug which has
10 been reviewed and/or approved by the Food and Drug
Administration ("FDA"), is of a specific potency, is prescribed
11 at a certain dosage, and is often accompanied by warnings
not to drive. Conversely, people who use illicit drugs do so to
12 impair themselves - to obtain a specific effect or desired
"high," which arguably makes them more likely to be unable
13 to drive safely. Under *Heller v. Doe*, [FN20] this or any other
14 reasonably conceivable rationale need not have been actually
considered by our Legislature to provide a basis for upholding
15 a statute reviewed under the rational basis test.

16 [FN20] 509 U.S. at 319-21, 113 S.Ct. 2637.

17 We conclude that NRS 484.379(3) is rationally related
18 to a legitimate state objective and is therefore constitutional.
In doing so, we reiterate that it is the province of the
19 Legislature to pass legislation, while our duty is to determine
whether such legislation passes constitutional scrutiny and is
20 therefore valid law. [FN21] Opponents of a valid statute must
21 look to the Legislature rather than the judiciary to amend the
law.

22 [FN21] See *Marbury v. Madison*, 5 U.S. (1
23 Cranch) 137, 177, 2 L.Ed. 60 (1803).

24 *Williams I*, 118 Nev. at 541-45, 50 P.3d at 1120-22 (citation footnotes 1-11, 13 & 16-17
25 omitted).

26 Under AEDPA, Williams must demonstrate that the foregoing decision is contrary
27 to or an unreasonable application of clearly established federal law as determined by the
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1 United States Supreme Court. Her arguments on this claim fall far short of carrying this
2 burden.

3 At the very outset, Williams' contention that the Supreme Court of Nevada erred in
4 not applying a strict scrutiny standard is not supported by apposite United States
5 Supreme Court authority. Petitioner contends that "[o]nce a person is given a driving
6 license by the State, he has an unenumerated constitutional right to drive." (ECF No. 110,
7 at 26 n.13) Neither Supreme Court decision cited by petitioner holds that a "right to drive"
8 is a fundamental federal constitutional right that gives rise to strict scrutiny on an equal
9 protection challenge.²² Deferential federal habeas review under AEDPA hardly is the
10 context in which new "unenumerated" federal constitutional rights that have not been
11 previously recognized by the United States Supreme Court are cut from whole cloth by a
12 lower federal court substituting its judgment on the question for that of a state supreme
13 court.²³

14 Williams relies upon various studies, including an alleged 1993 federal government
15 study that the amended petition alleges "determined that marijuana does not impair
16 driving performance at low doses, and in fact enhances driver safety once the effects of
17 the drug are felt by the user." (ECF No. 110, at 27.) Petitioner cites generally to such
18 studies and quotes selected material without specific page citation. However, it does not
19 appear that petitioner has properly made the actual studies themselves of record in this
20 matter, such as through expert testimony specifically cited in the record. The Court

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22 ²² In *Bell v. Burson*, 402 U.S. 535 (1971), the Supreme Court held that a State must provide
23 procedural due process prior to suspending the *state-created interest* reflected in a driver's license and
24 vehicle registration, regardless of whether the state-created interest was denominated a "right" or instead
25 a "privilege." Nothing in the case remotely states or implies that driving is a *federal constitutional right*. The
26 decision in *Shapiro v Thompson*, 394 U.S. 618 (1969), concerns a denial of welfare benefits to residents
27 with less than a year of in-state residency. *Shapiro* does not even mention driving, much less establish that
28 a right to drive is a fundamental constitutional right.

23 A concession at oral argument on direct appeal that rational-basis review applied would further
cut against petitioner's argument in federal court that the state supreme court instead should have applied
strict-scrutiny review. (*But cf.* ECF No. 110, at 26 n.13, denying that the point was conceded.) In all events,
the state supreme court's application of rational-basis review rather than strict-scrutiny review clearly was
neither contrary to nor an objectively unreasonable application of clearly established federal law as
determined by the United States Supreme Court. This Court further would reach the same conclusion as
to the standard applied on a *de novo* review.

1 cannot rely upon bare allegations without proper record support to establish any factual
2 matter, and it is petitioner's burden to make the factual material of record and then to
3 provide specific record citations. Moreover, if Williams also did not make the studies
4 properly of record in the state court record considered on direct appeal, *Pinholster* would
5 appear to bar this Court from considering the studies even if otherwise presented properly
6 in federal court.

7 In any event, even as described by Williams, the studies do not demonstrate that
8 the state supreme court's conclusion that the relevant statutes are rationally related to the
9 legitimate governmental interest of traffic safety was objectively unreasonable. Petitioner
10 maintains that "low" doses of marijuana have "approximately the same effect" on driving
11 ability as many nonprescription decongestant drugs, that even at high doses marijuana
12 does not impair driving ability "as much as" alcohol, and that "the psychomotor
13 impairment" associated with marijuana use is "minimal" and is compensated for when
14 driving. As to the last point, petitioner maintains that the studies reflect that drivers
15 "intoxicated by marijuana are often safer drivers than they normally would be because of
16 their over-awareness of the effects of the drug" because they "will compensate where
17 they can, for example, by slowing down or increasing effort." (*Id.*, at 27-28 & nn.16 & 17.)

18 It was not objectively unreasonable for the Supreme Court of Nevada to conclude
19 that a decision by the Nevada Legislature that it did not want drivers on the road impaired
20 with *arguendo* "approximately the same effect" as many nonprescription decongestants
21 was rationally related to traffic safety. Such nonprescription medications often include
22 warnings or cautions regarding driving while using the drugs. Indeed, a nonprescription
23 drug referred to by petitioner – Benadryl – is accompanied by cautionary advisements
24 that "marked drowsiness may occur" and that the user should "be careful when driving a
25 motor vehicle or operating machinery."²⁴ It is hardly inconsistent with a legitimate
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27 ²⁴ The Court takes judicial notice of the quoted advisements found on the manufacturer's website
28 at www.benadryl.com. The other nonprescription medication referenced by petitioner – Actifed – carried
similar cautions when this claim was reviewed internally circa 2010, but it appears that Actifed since has
been discontinued in the United States. An online citation source therefore no longer is readily available.

1 governmental interest in traffic safety for a state legislature to determine that any
2 purported benefits from having drivers on the road “approximately” similarly impaired from
3 an illicit drug is outweighed by the risks associated with such potential impairment.

4 It also was not objectively unreasonable for the Supreme Court of Nevada to
5 conclude that a decision by the Nevada Legislature that it did not want drivers on the road
6 potentially impaired by marijuana merely because they purportedly were not impaired “as
7 much as” they would have been on alcohol was rationally related to traffic safety. The
8 threshold required for alcohol intoxication under various state statutes does not
9 necessarily establish – via a line also etched in Supreme Court precedent – an inexorable
10 constitutional limit below which legislatures may not take action seeking to keep
11 potentially impaired drivers off the road. Small comfort is provided following a tragedy
12 from an observation that a driver with marijuana in her system was not impaired “as much
13 as” she would have been on alcohol.

14 In this same vein, it was not objectively unreasonable for the Supreme Court of
15 Nevada to conclude that a decision by the Nevada Legislature that it did not want drivers
16 on the road who had to “compensate” for their impairment – by, *inter alia*, driving slowly
17 or increasing effort in order to drive purportedly safely – was rationally related to traffic
18 safety. A rational legislature quite readily can – and most voters no doubt would think
19 should – reject the exceedingly dubious proposition that a driver intoxicated on marijuana
20 should be allowed to drive on the premise that they will drive safely because they will slow
21 down and/or try to focus harder in an attempt to counteract the effects of their intoxication.
22 A rational legislature – and the public – quite reasonably instead may want to have
23 unimpaired drivers behind the wheel rather than drivers having to compensate, hopefully
24 but not assuredly effectively, for an illicitly-induced potential impairment.

25 At bottom, petitioner’s studies – as alleged in the pleadings – do not establish an
26 absence of risk to safety from a driver with marijuana in her system. The studies instead
27 seek to minimize that risk in relation to other factors that also impair driving ability and/or
28 to weigh that risk differently than did the Nevada Legislature in this instance. Notably,

petitioner does not direct the Court's attention to a scientific study specifically addressing the relevant nanogram values listed in N.R.S. 484.379 and unequivocally establishing beyond peradventure that there can be no potential for impairment at that level. Such matters of degree and weighing of relative risk constitute the epitome of the type of decision reserved to legislatures under the rational basis standard of review. Petitioner has come forward with no apposite United States Supreme Court authority requiring that a state legislature give precedence to the studies upon which she relies as opposed to the standards and information – including the SAMHSA standards referred to by the Nevada Supreme Court – relied upon by the Nevada Legislature in making its legislative determination as to where the line should be drawn for public safety.

Williams has sought to frame the issue as one where the state legislature has “single[d] out for punishment . . . unimpaired drivers with trace amounts of marijuana or its metabolite . . . who pose no threat to traffic safety.” (ECF No. 110, at 26.) The studies upon which she relies, however, as presented in her pleadings, do not unequivocally establish that drivers with the amounts of marijuana specified in N.R.S. 484.379 are unimpaired drivers who pose “no threat” to traffic safety. The Nevada Legislature considered substantially the same arguments as presented here by petitioner and rejected the position that there was no direct correlation between the presence of the substances in a driver's system and impairment. See *Williams I*, 118 Nev. at 543, 50 P.3d at 1120-21.

In this regard, Williams points to her own contemporaneous acquittal of driving under the influence of a controlled substance, *to wit*, marijuana and/or ecstasy, to a degree that rendered her incapable of safely driving her vehicle. Both this Court and the Ninth Circuit held on Williams' prior petition, however, that her acquittal by such a simultaneous verdict carries no collateral estoppel effect. See *Jessica Williams v. Christine Bodo*, No. 2:03-cv-00874-PMP-LRL, ECF No.19, at 12-13 & n.10 (D. Nev., Mar. 2, 2004), *affirmed*, *Williams v. Warden*, 422 F.3d 1006, 1011 (9th Cir. 2005). Further to the point, Williams' own individual acquittal by the jury specifically of the alternative DUI

1 theory does not establish, as a general matter, that the Nevada Legislature has singled
2 out drivers who as a class are “unimpaired” and who pose “no threat” to traffic safety. It
3 is petitioner – not the Nevada legislature – who is positing in her argument that drivers
4 with the specified amounts of a prohibited substance are not impaired and pose no threat.
5 The Nevada Legislature, in contrast, appears to have “singled out” drivers who it believes
6 are potentially impaired and who, in its judgment, do pose a potential threat to traffic
7 safety. Petitioner’s alleged studies, as noted, concern not an absence of impairment and
8 threat but instead seek to weigh the degree of impairment and resulting risk. Such
9 weighing of risk and drawing of lines, again, constitute a classic matter of permissible
10 legislative judgment – a judgment directed generally to the populace at large rather than
11 to the particular situation of whether Williams herself was simultaneously acquitted of the
12 alternative DUI theory in her case.

13 Moreover, Williams’ argument ignores the second legitimate governmental interest
14 discussed by the Supreme Court of Nevada – that of deterring (what was then) illicit drug
15 use. Petitioner hardly carries her burden under AEDPA when she focuses only on one
16 of two involved governmental interests and ignores the other.

17 Under rational basis review, the congruity between the means reflected in the
18 legislative classification and the end sought to be served need not be perfect or exact.
19 Williams has not demonstrated that the state supreme court’s holding that the legislation
20 was rationally related to a legitimate governmental interest was either contrary to or an
21 unreasonable application of clearly established federal law – as to either of the two
22 governmental interests discussed in the court’s opinion.

23 The same conclusion follows as to petitioner’s subsidiary argument that the statute
24 violates the Equal Protection Clause because it arbitrarily imposes a different burden of
25 proof on “nonprescription” marijuana users as opposed to prescription marijuana users.
26 Williams refers in this regard to a provision that exempts substances used by persons
27 with a valid prescription from the definition of prohibited substances. *See Williams I*, 118
28 Nev. at 544, 50 P.3d at 1121. The Supreme Court of Nevada determined that the Nevada

Legislature could have reasonably determined that uncontrolled illicit use of a substance could pose a greater threat to the public, and the court further determined that the distinction was rationally related to a legitimate state objective also in deterring illicit drug use. The state supreme court's rejection of Williams' equal protection challenge on either basis was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Williams relies on this subsidiary argument upon the decision of the Supreme Court of Georgia in *Love v. State*, 271 Ga. 398, 517 S.E.2d 53 (1999). The Supreme Court of Georgia of course is not the Supreme Court of the United States. On deferential AEDPA review, this Court can no more substitute the judgment of the Supreme Court of Georgia for that of the Supreme Court of Nevada on the issue than it can substitute its own judgment for that of the state supreme court.²⁵

In the final analysis, Williams has not come forward with any apposite authority from the United States Supreme Court tending to establish that the decision of the Supreme Court of Nevada rejecting her equal protection claim was either contrary to or an unreasonable application of clearly established federal law. Indeed, it is notable that a number of other state courts also have rejected similar challenges to comparable *per*

²⁵ Moreover, in *Love*, the Supreme Court of Georgia addressed the relationship of the classification only to the state interest in traffic safety without also considering the state interest in deterring illicit drug use. *Compare Love*, 271 Ga. 402, 517 S.E.2d at 57 *with Williams I*, 118 Nev. at 544, 50 P.3d at 1121-22. Nor did the *Love* court address the additional public safety ramifications discussed in *Williams I*. *Id.* The Court additionally notes that the Supreme Court of Georgia also did not extend *Love* to a circumstance where the defendant was charged not simply with driving with a prohibited substance in her blood but instead was charged with reckless driving and vehicular homicide through reckless driving based in part upon having a prohibited substance in her blood. *See Ayers v. State*, 272 Ga. 733, 534 S.E.2d 76 (2000). In all events, however, the Supreme Court of Nevada was not required to follow the Georgia Supreme Court's decision in *Love*. Petitioner's burden in this case is to demonstrate that the decision in *Williams I* on this issue was contrary to or an unreasonable application of clearly established law *as determined by the United States Supreme Court*.

The Court additionally notes that, in *Love*, the Supreme Court of Georgia, like the Supreme Court of Nevada, otherwise held that there was a rational relationship between the *per se* drug statute and a legitimate governmental interest in public safety. That is, the Supreme Court of Georgia rejected the companion equal protection argument that Williams presents here based upon the contention that drivers with marijuana in their system necessarily are "unimpaired" and present "no threat" to traffic safety. *Love*, 271 Ga. at 399-02, 517 S.E.2d at 55-56.

se drug traffic safety statutes.²⁶ As noted above, petitioner cannot establish that a state court decision is contrary to or an unreasonable application of clearly established federal law under AEDPA by citation to the decisions of other state courts rather than to decisions of the United States Supreme Court. However, on the other hand, the fact that numerous state courts have ruled contrary to her position tends to cut against her claim that the Nevada Supreme Court's similar rejection of her claim was an objectively unreasonable application of United States Supreme Court precedent.

Ground 4(a) accordingly does not provide a basis for federal habeas relief.²⁷

Ground 4(b): Substantive Due Process

In Ground 4(b), Williams alleges that she was denied substantive due process in violation of the Fourteenth Amendment because the relevant Nevada state statutes allegedly are not rationally related to traffic safety because the statutes subject purportedly unimpaired drivers to prosecution. (ECF No. 110, at 30-33.)

The Supreme Court of Nevada rejected this claim on the following grounds in its August 2, 2002, decision:

²⁶ See, e.g., *State v. Smet*, 288 Wis. 525, 537-40, 709 N.W.2d 474, 480-82 (2005); *Shepler v. State*, 758 N.E.2d 966, 968-70 (Ind. Ct. App. 2001); *Loder v. Iowa Dept. of Transp.*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000); *State v. Phillips*, 178 Ariz. 368, 371-72 873 P.2d 706, 709-10 (1994); *People v. Gassman*, 251 Ill.App.3d 681, 692-93, 622 N.E.2d 845, 853-54 (1993); see also *State v. Schulz*, 34 N.Ed. 3d 176 (Ct. App. Ohio 2015); *Love*, 271 Ga. at 399-02, 517 S.E.2d at 55-56 (discussed in n. 25, *supra*); cf. *United States v. Reed*, 734 F.3d 881, 889-91 (9th Cir. 2013) (surveying state *per se* drugged driving laws in the course of holding that Nevada's statutes pertaining to driving with more than 2 nanograms of marijuana were assimilated by the federal Assimilative Crimes Act).

²⁷ Any equal protection challenge within Ground 4(a) focused specifically on prosecution for the presence of marijuana metabolite further would appear to be mooted by the Court's contemporaneous holding in this order on Ground 8(a) that Williams could not be convicted based upon the presence of marijuana metabolite. That is, Williams would not be entitled to greater relief on any successful metabolite-focused claim in Ground 4(a) than she is entitled to on Ground 8(a), a conditional writ grant with a possible retrial. In this regard, the state court record reflects that marijuana metabolite is not psychoactive. (*E.g.*, ECF No. 75-12, at 15 & 23; ECF No. 75-19, at 20-21; ECF No. 75-25, at 6.) The Court has not been presented with argument regarding an impairment-based rationale focused specifically on marijuana metabolite. Perhaps a legislature permissibly may find a sufficiently strong enough association between the presence of metabolite in certain amounts under typical testing protocols and the presence, as a practical matter at the relevant time, also of psychoactive content potentially resulting in intoxication. Moreover, as discussed in the text, the state supreme court also posited the additional legislative purpose of deterring (then) illicit drug use. Thus, even if a metabolite-focused aspect of Ground 4(a) is not mooted by the Court's holding on Ground 8(a), it is not a foregone conclusion that the state supreme court's August 2, 2002, implicit rejection also of that aspect of Ground 4(a) was either contrary to or an objectively unreasonable application of clearly established federal law as determined by the United States Supreme Court.

2. *Due process*

Williams next argues that the statute violates her right to substantive due process.[FN22] In this claim, Williams seems to mimic her equal protection arguments. Williams claims that the State may not deprive her of her right to drive while having “low” levels of marijuana because there is no rational, non-arbitrary connection to a legitimate purpose. In addition, Williams claims that the means utilized by the Legislature to achieve its legitimate purpose are too onerous because there is no legitimate interest in prosecuting unimpaired drivers for DUI. We conclude this argument lacks merit.

As previously discussed, there are several ways in which the statute could be rationally related to legitimate governmental objectives. One plausible rationale suffices even if not considered or articulated by the Legislature.[FN23] Further, when the constitutionality of a statute is examined using the rational basis standard, the state is not compelled to use the least restrictive means to reach the desired objective.[FN24] A statute analyzed under this standard must survive a constitutional challenge “even when there is an imperfect fit between means and ends.”[FN25]

[FN22] U.S. Const. amend. XIV, § 1.

[FN23] *Heller*, 509 U.S. at 319-21, 113 S.Ct. 2637.

[FN24] *Id.* at 320-21, 113 S.Ct. 2637.

[FN25] *Id.* at 321, 113 S.Ct. 2637.

Williams I, 118 Nev. at 545, 50 P.3d at 1122.

The state supreme court’s rejection of this claim was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

As the state high court noted, Williams’ substantive due process claim in the main parallels her equal protection claim and mirrors the arguments presented therein. This Court’s discussion of Ground 4(a), *supra*, accordingly is substantially applicable to Ground 4(b) as well.

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1 The state supreme court's holding that the Nevada statutory scheme was rationally
 2 related to legitimate governmental interests accordingly was neither contrary to nor an
 3 unreasonable application of clearly established federal law. As discussed at length as to
 4 Ground 4(a), Williams' cited studies, as alleged in her pleadings, did not establish beyond
 5 peradventure that a driver with the amount of marijuana or metabolite specified in the
 6 statute was unimpaired and presented no threat to public safety. Nor was the Nevada
 7 Legislature, which during legislative hearings considered substantially the same
 8 arguments that now are presented by Williams, required to accept her selected studies
 9 over the studies and standards that it followed in adopting the legislation. The day has
 10 long passed when courts, in considering a substantive due process claim, will substitute
 11 their own judgment for a considered state or federal legislative judgment on an issue and
 12 instead constitutionalize their own assessment of the underlying empirical data and
 13 competing policy considerations.²⁸

14 Further, Williams once again ignores the dual legitimate governmental interests
 15 noted by the Supreme Court of Nevada in rejecting her constitutional challenges.

16 ²⁸ Indeed, Williams explicitly relies in her substantive due process argument on two 1920's
 17 Supreme Court decisions – *Truax v. Corrigan*, 257 U.S. 312 (1921), and *F.S. Royster Guano Co. v. Virginia*,
 18 253 U.S. 412 (1920) – that were part of the long-discredited *Lochner* era of highly active federal judicial
 19 intervention in legislative decisions. See, e.g., Katie R. Eyer, *Protected Class Rational Basis Review*, 95
 20 N.C. L. REV. 975, 980 (2017) (referring to “the *Lochner*-era precedent of *F.S. Royster Guano Co.*”); Monica
 21 Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1524-25 & n.213 (2013)
 22 (*Truax* and similar cases exhibited “the defining error of the *Lochner* era”). As the Ninth Circuit observed
 23 in *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (*en banc*), “[t]he Supreme Court's opinion in
 24 *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), now symbolizes an era in which the
 25 Court, invalidating economic legislation, engaged in a level of judicial activism which was unprecedented
 26 in its time and unmatched since.” The Supreme Court would even state during this period, somewhat
 27 inartfully from today's perspective, that the “[d]etermination by the Legislature of what constitutes proper
 28 exercise of police power is not final or conclusive but is subject to supervision by the courts.” *Meyer v.*
Nebraska, 262 U.S. 390, 400 (1923). However, ultimately, Justice Brandeis' dissent in *Truax* instead “would
 mark the Court's future course” in response to the “overreaching” in *Truax* and similar *Lochner* era
 decisions. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to*
a Law for the Redress of Wrongs, 115 YALE L.J. 524, 576 (2005). *Lochner* and its progeny were repudiated
 by the late 1930's.

Williams thus relies on 1920's Supreme Court caselaw that was repudiated over eight decades
 ago. Legislative decisions instead are afforded much more deference under current substantive due
 process Supreme Court precedent. See, e.g., *Concrete Pipe and Products of California, Inc. v. Construction*
Laborers Pension Trust, 508 U.S. 602, 639 (1993). Accordingly, in sharp contrast to the long-repudiated
 interventionist authority relied upon by Williams, in this federal habeas case a deferential standard of review
 instead is being applied under AEDPA to a state court decision that in turn was applying a deferential
 standard of review to an underlying legislative determination.

1 Williams posits that “[t]he legislative purpose behind NRS 384.3795(1)(f) is to remove
2 impaired drivers from the roads and punish them accordingly.” (ECF No. 110, at 31.) The
3 state supreme court, however, expressly referred to legitimate governmental interests
4 both in traffic safety and “in deterring illicit drug use.” *Williams I*, 118 Nev. at 544, 50 P.3d
5 at 1121. Petitioner accordingly misses the mark when she suggests that the statute
6 impermissibly punishes individuals for “merely using marijuana . . . [with] no relationship
7 whatsoever to driving impairment.” (ECF No. 110, at 31.) The statute, as found by the
8 state supreme court, instead is directed at both promoting traffic safety and deterring
9 (then) illicit drug use. Williams hardly establishes that the state supreme court’s decision
10 was an objectively unreasonable application of clearly established federal law when she
11 disregards the full basis for the state court’s decision.

12 Williams further urges that the statute is unconstitutional “because it fails to require
13 a causal relationship between the ingested substance and the event leading to the injury
14 or death of another.” (ECF No. 110, at 36.) She relies upon *Ashcroft v. Free Speech*
15 *Coalition*, 535 U.S. 234 (2002), which stated that a federal child pornography law could
16 not be read to prohibit obscenity “because it lacks the required link between its
17 prohibitions and the affront to community standards prohibited by the definition of
18 obscenity.” 535 U.S. at 249. She draws from this quote – from a case addressing whether
19 a statute unconstitutionally abridged free speech – the principle that “[c]learly, legislation
20 to be constitutional must have a causal relationship between what is prohibited and what
21 occurred.” (ECF No. 110, at 37.)

22 Williams cites no apposite precedent from the United States Supreme Court
23 supporting such an approach to constitutional adjudication where the analysis of a
24 subsidiary issue in a First Amendment decision is applied in lieu of well-established
25 substantive due process precedent. The Supreme Court of Nevada identified the proper
26 controlling legal principles for a substantive due process claim, and its application of those
27 principles to this case was not objectively unreasonable. *Free Speech Coalition* is far
28 afield from the present case and is neither apposite to this case nor contrary to the state

1 supreme court's decision. This Court – particularly on deferential AEDPA review – clearly
2 cannot overturn the state supreme court's decision on such a flawed argument seeking
3 to apply precedent from a different area of constitutional law.²⁹

4 In this same vein, Williams urges that her simultaneous acquittal on an alternative
5 theory of driving under the influence establishes that there is no causal nexus between
6 the presence of marijuana and “the accident,” such that N.R.S. 384.3795(1)(f) is
7 unconstitutional. Petitioner's logic is flawed in a number of respects. First, as discussed
8 as to Ground 4(a), a simultaneous acquittal in a single trial carries no collateral estoppel
9 effect. Second, the constitutionality of N.R.S. 384.3795(1)(f) under a substantive due
10 process analysis in all events does not turn upon petitioner's characterization of causation
11 in her particular case. The question instead is one of whether the Nevada statutory
12 scheme is rationally related to a legitimate governmental interest. The state supreme
13 court's determination that the statutory line drawn was rationally related to legitimate
14 governmental interests – both in traffic safety and deterring (then) illicit drug use – was
15 not an objectively unreasonable application of clearly established federal law. Petitioner's
16 “causal nexus” argument instead is drawn from inapposite First Amendment authority and
17 seeks to hinge the constitutionality of the statutes upon her characterization of causation
18 in her own particular case. That is a fundamentally flawed analysis that finds no support
19 in apposite Supreme Court case law.

20
21
22 ²⁹ Williams relies upon a hypothetical in support of this argument that similarly is flawed. She posits
23 a hypothetical of a man who has residual marijuana in his system when the right front tire on his vehicle
24 blows out “suddenly without warning” causing an accident that kills six people. Williams urges that the man
25 would be subject to conviction and incarceration under NRS 384.3795(1)(f) solely because of his having
26 marijuana in his system despite the fact that the tire suddenly blowing out was the sole cause of the accident
27 per the hypothetical. (ECF No. 110, at 32.) Williams ignores the fact that the express terms of NRS
28 384.3795(1)(f) allow a conviction only where the defendant “does any act or neglects any duty imposed by
law while driving or in actual physical control of any vehicle . . . , if the act or neglect of duty proximately
causes the death of, or substantial bodily harm to, a person other than himself.” The man in the hypothetical
would not be culpable under the statute solely by virtue of the presence of marijuana in his system unless
in addition his act or neglect of duty proximately caused death or substantial bodily harm to another. In all
events, both petitioner's flawed legal argument and her flawed hypothetical beg the question of whether the
state supreme court's conclusion that the statute was rationally related to a legitimate governmental interest
was an unreasonable application of clearly established federal law as determined by apposite and
controlling United States Supreme Court precedent as of August 2, 2002.

As with Ground 4(a), in the final analysis, Williams has not come forward with any apposite authority from the United States Supreme Court tending to establish that the state supreme court's rejection of her substantive due process claim was either contrary to or an unreasonable application of clearly established federal law. As discussed also regarding her equal protection claim, it is notable that a number of other state courts have rejected similar constitutional challenges to comparable *per se* drug traffic safety statutes. The fact that numerous state courts have ruled contrary to her position tends to cut against her claim that the Nevada state supreme court's similar rejection of her claim was an objectively unreasonable application of United States Supreme Court precedent.

Ground 4(b) accordingly does not provide a basis for federal habeas relief.³⁰

Ground 4(c): Overbreadth

In Ground 4(c), Williams alleges that the relevant Nevada statutes are "unconstitutionally overbroad under the Federal Due Process Clause" because they allegedly fail to recognize that there are lawful uses to some parts of the marijuana plant and allegedly punish legal as well as illegal use of marijuana and its metabolites. Petitioner relies upon a statutory definition of marijuana in a different statute, N.R.S. 453.096, as support for her argument that Nevada law does not punish all uses of all parts of the marijuana plant. She maintains, for example, that hemp oil is excluded from the N.R.S. 453.096 definition of marijuana but allegedly still contains tetrahydrocannabinol (THC), the main psychoactive ingredient of marijuana. (ECF No. 110, at 33-35.)

The Supreme Court of Nevada rejected this claim on the following basis:

4. Overbreadth

Williams' [next] constitutional challenge is that NRS 484.379(3) fails to recognize the lawful use of the parts of the marijuana plant that are excluded from the definition of

³⁰ The discussion in note 27, *supra*, regarding marijuana metabolite is substantially applicable to Ground 4(b) as well. Williams additionally posits that the Supreme Court of Nevada failed to follow a state constitutional provision and that its decision was inconsistent with prior state caselaw. (ECF No. 110, at 31 n.21.) Williams must demonstrate a violation of federal – not state – law in order to obtain federal habeas relief. The Supreme Court of Nevada further is the final arbiter of the application of Nevada state law to the facts of petitioner's case. If the state supreme court was not persuaded by petitioner's state law arguments that is the end of the matter insofar as federal review is concerned.

1 marijuana under NRS 453.096(2). Williams argues that this
2 impermissibly punishes the use of all marijuana and that since
3 it captures legal conduct, the statute is overbroad. She also
4 argues that marijuana is not precisely defined in NRS
5 484.3795.

6 “[T]he overbreadth doctrine permits the facial
7 invalidation of laws that inhibit the exercise of First
8 Amendment rights.”[FN40] An overbreadth challenge may
9 only be made if a statute infringes upon constitutionally
10 protected conduct.[FN41] Absent such infringement, an
11 overbreadth challenge must fail.[FN42]

12 We have already determined that the statute being
13 challenged by Williams does not affect constitutionally
14 protected conduct. Therefore, Williams' overbreadth
15 argument is without merit.

16 [FN40] *Chicago v. Morales*, 527 U.S. 41, 52,
17 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality
18 opinion).

19 [FN41] *Hoffman Estates v. Flipside, Hoffman*
20 *Estates*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71
21 L.Ed.2d 362 (1982).

22 [FN42] *Id.*

23 *Williams I*, 118 Nev. at 547-48, 50 P.3d at 1123-24.

24 The state supreme court's rejection of this claim was neither contrary to nor an
25 unreasonable application of clearly established federal law.

26 The state supreme court's analysis was in full accord with governing Supreme
27 Court precedent at the time of its August 2, 2002, decision. The Ninth Circuit summarized
28 the governing law in this area as follows, in addressing an overbreadth challenge
grounded in the Free Exercise and Establishment Clauses of the First Amendment:

The more fundamental problem with GMA's argument
is that it assumes that overbreadth challenges can be based
on any constitutional provision. However, the Supreme Court
suggested in *United States v. Salerno*, 481 U.S. 739, 107
S.Ct. 2095, 95 L.Ed.2d 697 (1987), that the “overbreadth”
doctrine generally encompasses only freedom-of-speech
challenges. See *id.* at 745, 107 S.Ct. 2095 (“[W]e have not
recognized an ‘overbreadth’ doctrine outside the limited

context of the First Amendment”); see also *Alexander v. United States*, 509 U.S. 544, 555, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (“The ‘overbreadth’ doctrine, which is a departure from traditional rules of standing, permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute” (emphasis added)); *Canatella v. California*, 304 F.3d 843, 853 n. 12 (9th Cir.2002) (overbreadth standing pursuant to *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)) “applies only to statutes that regulate speech”); *Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir.1994) (suggesting overbreadth doctrine is designed to avert “a potential chilling effect on speech and lack of a proper party before the court”).

Although the Court recently suggested that overbreadth challenges can be brought in a few other settings, see *Sabri v. United States*, 541 U.S. 600, 609-10, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (citing cases addressing the right to travel, the right to abortion, and legislation under section 5 of the Fourteenth Amendment), the Court stated that “[o]utside these limited settings, and absent a good reason, [it does] not extend an invitation to bring overbreadth claims.” *Id.* at 610, 124 S.Ct. 1941. Indeed, the Court cautioned that “facial challenges are best when infrequent,” and in particular, overbreadth challenges “are especially to be discouraged.” *Id.* at 609, 124 S.Ct. 1941. We therefore reject GMA's overbreadth challenges based upon the Free Exercise and Establishment Clauses.

Gospel Missions of America v. City of Los Angeles, 419 F.3d 1042, 1051 (9th Cir. 2005).

Williams does not base the overbreadth claim in Ground 4(c) upon an allegedly overly broad infringement of any constitutional right, much less the requisite infringement of freedom of speech necessary to present a viable overbreadth challenge. She instead claims an overly broad infringement of purportedly licit use of certain parts of the marijuana plant. (ECF NO. 110, at 35.) Licit use of certain parts of the marijuana plant under a state statute is not a constitutionally protected right, much less one protected by the First Amendment prohibition on legislation restricting freedom of speech. Petitioner's overbreadth claim thus does not even make it out of the starting gate. She has no arguable constitutional overbreadth claim. Williams cites no United States Supreme Court precedent supporting this claim, as there was no such apposite precedent

supporting the claim at the time of the August 2, 2002, state supreme court decision. That court's rejection of the claim indisputably was neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court.

Ground 4(c) therefore does not provide a basis for federal habeas relief.³¹

Ground 4(d): Vagueness

In Ground 4(d), Williams alleges that the relevant Nevada statutes are void for vagueness because they allegedly do not provide fair notice of what conduct is prohibited. She maintains in this ground that there are over 400 compounds in marijuana and that the statutes are not clear as to which compounds are unlawful. She further urges that the statutes are unclear because a person may test positive for marijuana from second-hand marijuana smoke, and she uses the hypothetical example of a security guard who ingests second-hand smoke at a concert. She maintains, *inter alia*, that the statutes are unclear because THC and its metabolites are detectable in a user's blood for days and in her urine for weeks. She contends that a purportedly unimpaired driver will have no idea or indication when or if her driving will violate the statute days or weeks after ingesting marijuana. (ECF No. 110, at 36-38.)

The Supreme Court of Nevada rejected this claim on the following grounds:

3. Vagueness

Williams claims that the prohibited substance statute is void for vagueness because she cannot tell what part of the marijuana plant or which marijuana metabolites are prohibited

³¹ Petitioner further makes multiple factual assertions in the amended petition in support of the claim that are not supported by any specific citation to the state court record. For example, she alleges that "[i]t is known that hemp oil made from [marijuana] seeds contain THC." (ECF No. 110, at 35.) Any relative THC content of processed hemp oil is not something of which the Court can take judicial notice. Particularly following *Pinholster*, a petitioner must demonstrate support in the state court record for all factual assertions relied upon in support of federal habeas relief.

The Court also notes that, outside of overbreadth doctrine, petitioner has no standing to present the challenge that she seeks to present. Under the facts of this case, Williams had marijuana in her system not from hemp oil or any of the other myriad purportedly licit uses postulated in her pleadings but instead from illicit use of marijuana – per her own admission as well as per the pipe and bag of marijuana (which was not simply mature stems or sterilized seeds exempted by N.R.S. 453.096) recovered at the scene. See also note 32, *infra* (defense concession in opening statement).

In the final analysis, however, the claim simply lacks any foundation in established constitutional doctrine as determined by the United States Supreme Court.

1 or when she has reached the levels proscribed by NRS
2 484.379(3).

3 A statute is void for vagueness if it fails to give a person
4 of ordinary intelligence fair notice that her conduct is forbidden
5 by statute. While a facial attack may be asserted as to a
6 statute that implicates constitutionally protected conduct, a
7 statute that does not implicate constitutionally protected
8 conduct, as in this instance, may be void for vagueness only
9 if it is vague in all of its applications. The Due Process Clause
10 “does not require impossible standards of specificity in penal
11 statutes.” Instead, a statute will be deemed to have given
12 sufficient warning as to proscribed conduct when the words
13 utilized have a well settled and ordinarily understood meaning
14 when viewed in the context of the entire statute. Statutes are
15 presumptively valid and the burden is on those attacking them
16 to show their unconstitutionality. Williams thus has the burden
17 of proving that the statute failed to provide adequate notice of
18 the proscribed conduct.

19 In *Phillips*, [*supra*,] the Arizona Court of Appeals
20 considered the argument that Arizona's per se drug statute
21 was unconstitutionally vague. The court rejected the claim
22 and held that the statute provided adequate warning of the
23 proscribed conduct because none of the terms utilized in the
24 statute defied common understanding, and interpretation of
25 the statute was not dependent on a third party's judgment.
26 *Phillips* held that a potential offender was therefore on notice
27 that any driver who has ingested a prohibited drug would be
28 subject to prosecution.[FN33] In *People v. Gassman*, the
Illinois Court of Appeals rejected a vagueness challenge to
the Illinois per se drug statute for similar reasons. Like the
Arizona statute, the Illinois statute prohibits driving with any
detectable amount of drugs in the system.

21 Nevada's prohibited substance statute is even more
22 explicit than the Arizona or Illinois statutes because only ten
23 substances or metabolites are prohibited and the proscribed
24 amount is indicated for both blood and urine levels. In
25 addition, because the statute contains the specific amount of
26 drug that is prohibited, there is even less need to depend on
27 a third party's judgment.

25 The substance at issue in the present case is
26 marijuana and its metabolite. Although marijuana is not
27 defined in NRS Chapter 484, it is defined in NRS 453.096. A
28 metabolite, as defined in an ordinary dictionary, means a
“product of metabolism.”[FN36] Considering the plain

1 meaning of the terms, we conclude that a person of ordinary
 2 intelligence has adequate notice of the meaning of marijuana,
 3 and that marijuana metabolites are those metabolites that
 4 result from ingesting marijuana - as defined in NRS 453.096.
 5 We note that Williams appears to have clearly understood the
 6 common meaning of the term "marijuana." Williams
 7 acknowledged being a regular marijuana user and turned over
 8 her pipe containing marijuana residue to a police officer at the
 9 collision site. She was also found to be in possession of a
 10 plastic bag later found to contain marijuana.

11 Williams' second vagueness claim is that a person
 12 cannot tell when he or she will reach the prohibited levels of
 13 marijuana. In *Slinkard v. State*, we considered and rejected
 14 this same argument with regard to the alcohol per se statute.
 15 We determined that a person of average intelligence could
 16 reason that consumption of a substantial quantity of alcohol
 17 could result in the proscribed level and held that this sufficed
 18 to satisfy the notice requirement. In the context of this case,
 19 the argument is even weaker because unlike alcohol - which
 20 may be legally possessed and consumed - it is unlawful to use
 21 or possess marijuana in any amount.[FN39] Williams was
 22 given adequate notice that she was not permitted to legally
 23 possess or use marijuana, yet she chose to do both and then
 24 drive a vehicle. Further, the statute provides adequate notice
 25 that it is unlawful to drive with clearly defined levels of
 26 marijuana or marijuana metabolite in the bloodstream.

27 [FN36] See Random House Webster's College
 28 Dictionary 823 (2d ed.1996).

.....

[FN39] NRS 453.336 (possession of a
 controlled substance); NRS 453.411 (being
 under the influence of a controlled substance).

Williams I, 118 Nev. at 545-47, 50 P.3d at 1122-23 (citation footnotes 26-35 & 37-38
 omitted).

The state supreme court's rejection of this claim was neither contrary to nor an
 unreasonable application of clearly established federal law.

Over and above the analysis of the constitutional claim by the state supreme court
 under the authorities cited therein, Williams does not appear to have standing to pursue
 most or all of the void-for-vagueness claim presented. At the relevant time, it was long-

1 established law that, outside of the First Amendment context, a criminal defendant has
2 standing to raise a vagueness challenge only if the statute is vague as applied to her
3 specific conduct. See, e.g., *United States v. Dischner*, 974 F.2d 1502, 1510 (9th
4 Cir.1992), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031, 1035
5 n.1 (9th Cir.1997) (*en banc*). Outside of the First Amendment context, the reviewing court
6 need examine the vagueness challenge only under the facts of the particular case and
7 decide whether, under a reasonable construction of the statute, the conduct in question
8 is prohibited. *Id.* An individual who engages in conduct that clearly is proscribed cannot
9 complain of the vagueness of the law as applied to the conduct of others under other
10 hypothetical applications of the statute. See *Dischner*, 974 F.2d at 1510 n.5.

11 In the present case, Williams presents no evidence that she ingested only certain
12 of the allegedly 400 compounds in marijuana, and not others, to the extent that that would
13 make a difference. Nor did she ingest marijuana solely through second-hand smoke,
14 such as while acting as a security guard at a concert. Nor did she ingest marijuana days
15 or weeks before the incident and then abstain continuously up to the time of the incident.
16 Rather, she admitted to using marijuana as recently as approximately two hours prior to
17 the incident, and police recovered Williams' pipe and bag of marijuana at the scene.
18 *Williams I*, 118 Nev. at 539, 50 P.3d at 1118. Williams' own conduct therefore fell squarely
19 within the very core of the conduct proscribed by the statute. She therefore does not
20 have standing to challenge the statute for vagueness based upon hypothetical situations
21 that have no relevance to her own situation – where by her own admission she had
22 smoked marijuana approximately two hours before the incident and where she had illegal
23 marijuana in her possession at the time.³²

24 Ground 4(d) therefore does not provide a basis for federal habeas relief.

25
26 ³² Williams also was convicted of use of a controlled substance, to wit, marijuana and/or ecstasy,
27 and possession of a controlled substance, to wit, marijuana. 118 Nev. at 540, 50 P.3d at 1119; ECF No.
28 76-6, at 15; ECF No. 76-7, at 14 & 16. Williams' counsel stated on the record to the jury in the defense
opening statement that Williams had instructed him not to defend against these charges. ECF No. 75-3, at
16. Finally, on Ground 4(d) as well, Williams provides no citation to any state court record support, other
than one piece of expert testimony at trial.

Ground 5: Sufficiency of the Evidence and Jury Instruction

In Ground 5, Williams presents what are two factually related but nonetheless legally distinct claims. The Court will divide these distinct claims into subparts (a) and (b) of Ground 5. The Court will discuss the challenge to the sufficiency of the evidence first in order to more efficiently set forth the background to the two claims.³³

Ground 5(a): Sufficiency of the Evidence – Stems and Seeds

In Ground 5(a), Williams alleges that the evidence was insufficient to sustain a conviction under N.R.S. 484.3795(1)(f) because the State allegedly failed to prove that the marijuana and marijuana metabolite levels in her bloodstream came from illegal rather than legal portions of the marijuana plant. She proceeds from the premise that “mature stems of the plant . . . or the sterilized seed of the plant” are excluded from the statutory definition of “marijuana” under N.R.S. 453.096, which is quoted in full, *infra*. From this premise, she urges that the THC and marijuana metabolite found in a person’s blood resulting from the purported “lawful” use of marijuana – *i.e.*, allegedly, smoking stems and seeds included within a bag of marijuana – cannot be lawfully punished under N.R.S. 484.3795(1)(f). Petitioner asks the Court “to imagine a drinking fountain from which one half of the fountain is legal to drink while the other half is illegal.” She maintains that “[t]he burden is on the state to show from which side of the fountain the defendant drank.” (ECF No. 110, at 39-40.)

On direct appeal, Williams, as she has done here, intertwined a claim challenging the sufficiency of the evidence on this basis also with a claim of trial court error in declining to give a jury instruction on this argument. The two claims were bundled together under the following contention heading: “THE TRIAL COURT ERRED IN NOT ALLOWING JESSICA A JURY INSTRUCTION ON HER THEORY OF THE CASE AND THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO CONVICT ON THE SIX (6) DRIVING UNDER THE INFLUENCE CHARGES.” (ECF No. 76-11, at 5; ECF No. 76-12, at 24.)

³³ With only minor variation primarily as to style, form or supporting citation, Ground 5 in the amended petition filed by appointed counsel is the same as in the original and amending petitions filed by original counsel.

1 At the end of its lengthy published opinion on direct appeal, the Supreme Court of
2 Nevada added a concluding paragraph to summarily reject the remaining claims on the
3 merits. The paragraph expressly referred to multiple claims in abbreviated fashion,
4 including, in pertinent part, the following:

5 E. *Other claims of error*

6 Williams further . . . contends that the district court
7 erred . . . in refusing a proffered jury instruction These
arguments were fully briefed. We have considered them and
conclude that they too lack merit.

8 *Williams I*, 118 Nev. at 554, 50 P.3d at 1127.

9 Williams did not file any rehearing petition suggesting that the state supreme court
10 had overlooked any claim. Neither side has suggested during the subsequent federal
11 litigation, spanning seventeen years and two federal habeas actions, that the state
12 supreme court failed to consider all claims presented on direct appeal, including the
13 challenge to the sufficiency of the evidence that Williams intertwined with the jury-
14 instruction claim that the court did expressly reference.

15 When a state court denies relief in an order that expressly addresses some of the
16 claims raised by a defendant but that does not expressly refer to another claim that she
17 also raises, “a federal habeas court must presume that the [unmentioned] federal claim
18 was adjudicated on the merits – but that presumption can in some limited circumstances
19 be rebutted.” *Johnson v. Williams*, 568 U.S. 289, 292-93 & 301 (2013). This presumption,
20 while not irrebuttable, “is a strong one that may be rebutted only in unusual
21 circumstances.” *Id.*, at 302. While it is preferable, time and docket permitting, for an
22 appellate court to list every distinct claim properly presented by an appellant, “federal
23 courts have no authority to impose mandatory opinion-writing standards on state courts.”
24 *Id.*, at 300.

25 In the present case, Williams does not refer to, much less seek to overcome, the
26 above presumption, in her amended petition and reply that were filed several years after
27 the above *Williams* decision. Nor does she make any argument here in the district court
28 that this Court’s review of Ground 5(a) should be *de novo* premised on any argument that

the claim was overlooked. What appears to be most probable is that a busy state supreme court wrapping up what had been a long order simply referred to two claims that had been inartfully argued together by counsel by the shorthand reference to Williams' claim based upon "refusing a proffered jury instruction." The Supreme Court of Nevada certainly reflected an intention to also clear the "other claims of error," which had been "fully briefed," with the court briefly reflecting that it had "considered them and conclude[d] that they too lack[ed] merit." The court referred to the very portion of Williams' briefing that included the insufficient-evidence claim, *i.e.*, her briefing also arguing that her proffered instruction on the same underlying factual point should have been given. The order in question otherwise was denying relief on the merits while affirming a judgment of conviction on direct review, without asserting instead any procedural bars. Particularly given that no one has suggested in the ensuing eighteen years that the state supreme court overlooked what this Court parses out separately as Ground 5(a), the Court holds that unusual circumstances are not presented such as would overcome the strong presumption that the Supreme Court of Nevada rejected the claim on the merits.³⁴

When a state court rejects a claim on the merits without articulating a specific rationale, AEDPA's deferential standard of review continues to apply. *Harrington v. Richter*, 562 U.S. 86, 92 & 97-100 (2011). In that situation, the federal court must consider the arguments or theories that could have supported the state court's decision:

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). . . .

³⁴ The Court has an obligation to independently determine the correct standard of review, and the issue is nonwaivable. *E.g.*, *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014). However, the fact that no one involved in the case has considered a possibility that the state may have overlooked this claim until the prospect is raised now by a federal reviewing court eighteen years later (together with the other factors discussed in the text) "makes such a mistake [by the state court in 2002] most improbable." *Williams*, 568 U.S. at 306. That is, petitioner's failure to pursue the point previously is pertinent information under the Supreme Court's *Williams* opinion when this Court exercises its obligation to independently determine the correct standard of review. *See also Harrington v. Richter*, 562 U.S. 86, 100 (2011) ("*Richter* has *failed to show* that the California Supreme Court's decision did not involve a determination of the merits of his claim.") (emphasis added).

1 Under § 2254(d), a habeas court must determine
 2 what arguments or theories supported *or, as here, could have*
 3 *supported*, the state court's decision; and then it must ask
 4 whether it is possible fairminded jurists could disagree that
 those arguments or theories are inconsistent with the holding
 in a prior decision of this Court. . . .

5 It bears repeating that even a strong case for relief
 6 does not mean the state court's contrary conclusion was
 unreasonable. . . .

7 If this standard is difficult to meet, that is because it was
 8 meant to be. As amended by AEDPA, § 2254(d) stops short
 9 of imposing a complete bar on federal-court relitigation of
 10 claims already rejected in state proceedings. *Cf. Felker v.*
 11 *Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827
 12 (1996) (discussing AEDPA's "modified res judicata rule" under
 § 2244). It preserves authority to issue the writ in cases where
 there is no possibility fairminded jurists could disagree that the
 state court's decision conflicts with this Court's precedents. It
 goes no further. Section 2254(d) reflects the view that habeas
 corpus is a "guard against extreme malfunctions in the state
 13 criminal justice systems," not a substitute for ordinary error
 14 correction through appeal. *Jackson v. Virginia*, 443 U.S. 307,
 15 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J.,
 16 concurring in judgment). As a condition for obtaining habeas
 corpus from a federal court, a state prisoner must show that
 the state court's ruling on the claim being presented in federal
 court was so lacking in justification that there was an error well
 understood and comprehended in existing law beyond any
 possibility for fairminded disagreement.

17
 18
 19 *Richter*, 562 U.S. at 101-03 (emphasis added).

20 In the present case, the state supreme court's summary rejection of Ground 5(a)
 21 on the merits was neither contrary to nor an objectively unreasonable application of
 22 clearly established federal law as determined by the United States Supreme Court.

23 On a challenge to the sufficiency of the evidence, the habeas petitioner faces a
 24 "considerable hurdle." *Davis v. Woodford*, 333 F.3d 982, 992 (9th Cir. 2003). Under the
 25 standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), the jury's verdict must
 26 stand if, after viewing the evidence in the light most favorable to the prosecution, any
 27 rational trier of fact could have found the essential elements of the offense beyond a
 28 reasonable doubt. *E.g., Davis*, 333 F.3d at 992. The reviewing court, when faced with a

record of historical facts that supports conflicting inferences, therefore must presume that the trier of fact resolved any such conflicts in favor of the prosecution and defer to that resolution, even if the resolution by the state court trier of fact of specific conflicts does not affirmatively appear in the record. *Id.* The *Jackson* standard is applied with reference to the substantive elements of the criminal offense as defined by state law. *E.g., Davis*, 333 F.3d at 992.

When the deferential standards of AEDPA and *Jackson* are applied together, the controlling question for decision on federal habeas review thus becomes one of whether the state court's decision reflected an unreasonable application of the *Jackson* standard to the evidence presented at trial. See, e.g., *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005). Accordingly, to present a successful insufficient-evidence claim under *Jackson* on federal habeas review, the petitioner typically must overcome two layers of deference: deference to the jury's decision under *Jackson*, and, also, where the state court rejected the claim on the merits, to the state court's decision under AEDPA. *E.g., Kyzar v. Ryan*, 780 F.3d 940, 948 (9th Cir. 2015).

The statute pertinent to Williams' claim, N.R.S. 453.096, which was given as a jury charge, provided – in full – as follows at the relevant time:

1. "Marihuana" means:

- (a) *All parts of any plant of the genus Cannabis, whether growing or not;*
- (b) *The seeds thereof;*
- (c) *The resin extracted from any part of the plant; and*
- (d) *Every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.*

2. "Marihuana" does not include the *mature* stems of the plant, *fiber produced from the stems*, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the *mature* stems (except

the resin extracted therefrom), fiber, oil or cake, or the
sterilized seed of the plant *which is incapable of germination*.

N.R.S. 453.096, as amended through 1975 Laws, ch. 319, § 1, p. 450 (emphasis added);
see also ECF No. 76-6, at 20 (jury instruction).

Williams alleges, *inter alia*, that (a) the portions of the plant exempted under N.R.S.
453.096 “contain the same four hundred (400) compounds as” the parts of the plant
included within the definition; and (b) she “established at trial that the bag of marijuana
contained mature stems and seeds.” (ECF No. 110, at 39-40.) Once again, as with
multiple preceding claims, petitioner provides no supporting citation to the state court
record.³⁵

It appears that the scant portions of the state court trial record that relate to this
claim reflect only the following.

After the incident, officers recovered from the van that Williams had been driving,
inter alia, a glass pipe and a baggie containing “a green leafy substance” that the officers
believed to be marijuana. Laboratory testing confirmed that the green leafy substance
was marijuana, weighing 8.45 grams, or nearly a third of an ounce. (ECF No. 75-7, at 33;
ECF No. 75-8, at 7 & 12; ECF No. 75-11, at 32.)

The evidence regarding blood draws is summarized in more detail, *supra*, at 19-
20. The lab results obtained for the State reflected that Williams’ blood – as of the time
of the first blood draw a little over an hour after the incident – had more than twice the
amount provided for in N.R.S. 484.379(3) for marijuana and more than twelve times the
amount provided for in the statute for marijuana metabolite. At the time of the third blood
draw, the lab results reflected that Williams’ blood still had more than twice the statutory
amount of marijuana and over ten times the statutory amount of marijuana metabolite.

During direct examination of a defense expert, Williams’ counsel asked the expert
to describe the parts of the marijuana plant. The State objected on the basis that the

³⁵ Williams has had ample opportunity to demonstrate support for her claims in the state court
record. Two different sets of lawyers collectively have filed three original or amending petitions and two
replies over the nearly sixteen-year life of this habeas case. ECF Nos. 1, 24, 77, 110 & 127. Federal
habeas pleading is not notice pleading, and a petitioner cannot leave it to the Court to go searching through
an extensive trial transcript to find possible support for her multiple claims, on claim after claim.

1 court had ruled that testimony regarding parts of the plant was not admissible. The trial
 2 judge acknowledged that he had made “certain pretrial rulings” but allowed the question
 3 for background and general information. (ECF No. 75-9, at 19.)³⁶

4 The expert thereafter testified that the parts of the marijuana plant included, *inter*
 5 *alia*, stems and seeds and further that he commonly would find stems and seeds in the
 6 samples of marijuana that he analyzed. Defense counsel asked the expert to examine
 7 the bag of marijuana in evidence to determine whether there were any stems or seeds in
 8 the marijuana. On initial review, the expert testified that he saw “leaves and stems . . .
 9 quite a few stems . . . actually,” but he further stated that “I do not see any seeds, though,
 10 in this here.” Counsel then himself sought to point out what he believed was a seed in
 11 the marijuana, which elicited a sustained objection. The expert then acceded that “[t]here
 12 may be one or two seeds” in the marijuana. The expert was not asked whether, and did
 13 not testify that, the stems that he observed were “mature” stems. The expert also was
 14 not asked whether, and did not testify that, the maybe “one or two seeds” were sterilized
 15 seeds incapable of germination. (ECF No. 75-19, at 19-20.)³⁷

16 During closing argument, Williams’ counsel – not a witness – held the bag of
 17 marijuana in front of the jury and asked them to “take a look and notice – the seeds – and,
 18 more particularly, the stems that are involved – that are in this particular marijuana.”

19
 20 ³⁶ While the claims challenging the sufficiency of the evidence and the refusal to give a jury charge
 21 were exhausted on direct appeal, Williams did not fairly present and exhaust what would have been a
 22 wholly distinct challenge claiming constitutional error in a pretrial ruling limiting this line of inquiry in the first
 23 instance. This Court has addressed only the claims that were both exhausted in the state court and
 24 presented in the federal pleadings. The claim presented in Ground 5(a) challenging the sufficiency of the
 evidence is decided based on the evidence that in fact was admitted at trial, without regard to any issues
 as to what evidence instead should have been admitted. *Cf. McDaniel v. Brown*, 558 U.S. 120, 130-31
 (2010). The Court thus has no occasion to delve into why the line of inquiry was precluded and/or whether
 it should have been precluded. The Court further notes again that Williams was not restricted by this Court
 in the claims that she could pursue in state court during the stay of this action. (See note 20, *supra*.)

25 ³⁷ The Court notes as an aside in passing that mostly seedless marijuana, called *sinsemilla*
 26 (Spanish for “without seed”), is cultivated by segregating female plants from male plants to prevent
 27 pollination, which increases potency. It thus is not at all implausible that a bag of marijuana – such as
 28 potentially the one viewed by the expert at trial – would not have included seeds or many seeds. See, e.g.,
United States v. Hudson, 717 F.2d 1211, 1214 (8th Cir. 1983); *State v. Smith*, 51 Or.App. 777, 627 P.2d
 26, 27 (1981); *In re Jaffee*, 319 Or. 172, 874 P.2d 1299, 1307 n.5 (1994). In all events, in the evidence
 presented at Williams’ trial, the expert testified only that he possibly observed “one or two seeds;” and he
 did not testify that any such seeds were sterilized and not capable of germination.

1 Counsel – not a witness – stated that “there are some parts that are in there that are
2 stems.” (ECF No. 76-2, at 21; ECF No. 76-3, at 4.)

3 Defense counsel further stated in closing argument that “Dr. Kelly, I elicited from
4 him, that all parts of the plant contain THC, to various amounts, but every part would
5 contain it.” (ECF No. 76-2, at 122.) The Court, unaided by any record citation by
6 petitioner, was unable to find testimony by the witness stating that all parts of the
7 marijuana plant contain THC. Dr. Raymond Kelly, Ph.D, a forensic toxicology expert
8 called by the State, instead responded affirmatively on cross to two questions asking
9 whether (a) “the [marijuana] plant contains various parts;” and (b) THC was “one of the
10 components that’s in the marijuana plant.” (ECF No. 75-12, at 14 & 22-23.) Establishing
11 only that the marijuana plant “contains . . . parts” and that there is THC “in the marijuana
12 plant” does not establish that there is THC in every part of the marijuana plant. Just as a
13 matter of basic logic, it can be true that a plant has parts and that it has THC without it
14 also being necessarily true that the THC in the plant is in every part of the plant. The
15 witness thus did not testify that every part of the plant contained THC in various amounts
16 but only that THC was a component of the marijuana plant, without specifying the location
17 or concentration of the THC. Dr. Kelly’s testimony therefore did not establish in particular
18 that mature stems – if any in the marijuana in evidence – and sterilized seeds – if any in
19 that marijuana – contained THC in any amount, much less in any amount material to the
20 issues in the case.

21 Counsel argued in the defense closing that there was no way to know that the
22 marijuana and metabolite in the blood tests came from the “criminalized” rather than the
23 “non-criminalized” portion of the marijuana plant. (ECF No. 76-3, at 4.) The State
24 responded to Williams’ “stems and seeds” argument with the, to an extent, apt point that
25 Williams had conceded the criminal charge of using marijuana – not non-criminal
26 marijuana – at the relevant time, such that she could not “have it both ways.” (*Id.*)

27 On the foregoing record, an implicit determination by the state supreme court that,
28 viewing the evidence in the light most favorable to the State, a rational trier of fact could

1 have found the essential elements of the offense beyond a reasonable doubt was not an
2 objectively unreasonable application of *Jackson*.

3 With regard to seeds, the relevant Nevada statute expressly *includes* seeds within
4 the definition of “marijuana.” To the extent, if any, that there were seeds in the nearly
5 one-third ounce of marijuana in evidence, there was no evidence in the record that any
6 such seeds were sterilized seeds incapable of germination. Viewing the evidence in the
7 light most favorable to the prosecution, which is what is required on *Jackson* review, a
8 rational juror readily could have concluded on the evidence presented that any THC
9 and/or marijuana metabolite measured in Williams’ bloodstream that arguably was
10 attributable specifically to seeds was from a portion of the marijuana plant that constituted
11 “marijuana” under N.R.S. 453.096.³⁸

12 Similarly, with regard to stems, the statute expressly includes “all parts” of the
13 *Cannabis* plant with a pertinent exception only for “mature” stems. The statute further
14 refers to the capability of producing fiber from such stems, suggesting a fair amount of
15 substantiality. There was no evidence in the record that any stems in the nearly one-third
16 ounce of marijuana were “mature” stems, and the exclusionary language in the statute
17 refers only to “mature” stems as against the general rule that “all parts” of the plant are
18 included within the definition of “marijuana.” Viewing the evidence in the light most
19 favorable to the prosecution, which again is what is required on *Jackson* review, a rational
20 juror easily could have concluded on the evidence presented that any THC and/or
21 marijuana metabolite measured in Williams’ bloodstream that arguably was attributable
22 to stems was from a portion of the marijuana plant that constituted “marijuana” under
23 N.R.S. 453.096.

24 Moreover, the jury itself could see the third of an ounce of marijuana in evidence
25 and the relative amount of seeds, sterilized or not, and stems, mature or not, in relation
26

27 ³⁸ The Court is not suggesting that Williams had any burden at trial to establish any fact. At the
28 end of the proverbial day, however, there was no evidence in the record before the jury of the presence –
in a baggie of illicit marijuana – of any sterilized seeds incapable of germination. The jury clearly was not
precluded from finding Williams guilty merely because seeds possibly were in the marijuana in evidence.

1 to the remaining indisputably marijuana in the baggie. It was not objectively unreasonable
 2 for the Supreme Court of Nevada, viewing the evidence in the light most favorable to the
 3 State and presuming that the jury resolved all conflicting inferences in favor of the State,
 4 to conclude that the jury properly could find on the evidence presented that the amount
 5 of any licit material was insubstantial in relation to the amount of indisputably marijuana
 6 in the baggie. The jury, again, had the baggie of marijuana in evidence before it.

7 In short, viewing the evidence in the light most favorable to the State, a rational
 8 juror easily could have concluded that the defense, both figuratively as well as essentially
 9 literally, was clutching at straws in this regard. The short shrift given this claim by the
 10 Supreme Court of Nevada is indicative of its lack of merit. The state high court's summary
 11 rejection of this claim clearly was not an objectively unreasonable application of *Jackson*.

12 Ground 5(a) therefore does not provide a basis for federal habeas relief.³⁹

13
 14 ³⁹ In addressing this claim, the Court has hewed to what was contained in the state court record
 15 filed herein, which did not include very much on this issue. The Court must note in passing, however, that
 16 there is a very clear reason why statutes such as N.R.S. 453.096 distinguish between licit and illicit parts
 17 of *Cannabis* plants. That reason would not at all help Williams' claim. The circa 1971 Nevada statute
 18 substantially tracks the definition in the circa 1937 federal statute codified at 21 U.S.C. § 802(16). As the
 19 Ninth Circuit has explained, this statutory definition excludes portions of the *Cannabis* plant that (a) have
 20 other licit utility, while (b) having no more than "miniscule trace amounts of THC" that are insufficient to be
 psychoactive and show up in drug screens. See *Hemp Industries Assoc. v. DEA*, 357 F.3d 1012, 1013 &
 n.2, & 1018 (9th Cir. 2004) (*Hemp II*); *Hemp Industries Assoc. v. DEA*, 333 F.3d 1082, 1085 & 1088-89 (9th
 Cir. 2003) (*Hemp I*). Thus, in truth, if Williams had established – in a record that fully explained the situation
 – that she had smoked also portions of the plant falling outside the definition of "marijuana" under N.R.S.
 453.096, she would not have established that the noncriminal portions of the plant potentially contributed
 materially to her drug screen results. While THC perhaps may be present in some licit parts of the plant,
 in no more than trace amounts, it is not – at all – present in the same amounts as in the illicit parts.

21 Williams' analogy of a drinking fountain from which one half of the fountain is legal to drink while
 22 the other half is illegal therefore is flawed. Even if the baggie in her case (or more precisely the pipe bowls
 23 that she actually smoked that day) had been half full of licit material with the other half being illicit
 "marijuana," that would not have led to half of the THC content in her blood coming from licit material. That
 material is licit under N.R.S. 453.096 precisely because it has, at best, only trace amounts of THC.

24 It thus would appear that the trial court likely properly excluded pretrial what was a misleading and
 25 completely flawed defense. The argument could lead nowhere productive because there simply was not
 26 enough THC in any such licit portions of the plant – if any in fact were smoked in this case – to materially
 27 impact Williams' blood test results. The material was licit again precisely because of the absence of any
 significant amount of THC. Defense counsel was able to work the argument back into the case at trial
 initially via the back door of "background." Williams thereafter has been able to make something out of
 what in truth should be nothing only because the state court record on file is so bare on the point.

28 However, in all events, whether the Court hews strictly to what is in the state court record or instead
 also looks to the underlying reason why any licit materials were licit, Ground 5(a) clearly does not present

Ground 5(b): Jury Instruction – Stems and Seeds

In Ground 5(b), Williams alleges that the state trial court erred in not allowing a jury instruction on a theory of defense based on her stems-and-seeds argument described above in Ground 5(a).

As described above, the Supreme Court of Nevada summarily rejected this claim as being without merit, in this instance specifically referring to the claim now presented in Ground 5(b). The Court reviews this summary rejection under AEDPA's deferential standard of review. (See text, *supra*, at 69-72.)

Williams contends only that she was entitled "as a matter of law to an instruction on a theory of the case," and she cites only a Nevada state case that in turn cites state authorities. Petitioner does not allege that she was denied a federal constitutional right by the denial of the jury charge. She does not cite any apposite United States Supreme Court authority establishing a federal constitutional violation from the denial of the unspecified jury charge. (ECF No. 110, at 39-40).

Even separate and apart from AEDPA, federal habeas review is not a second *de novo* direct appeal in which the federal district court rehears claims of state district court error under state law. The federal habeas petitioner instead must allege federal claims with particularity, including specifying the federal constitutional ground upon which she relies. *E.g.*, *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005). Further, as has been noted repeatedly herein, it is the petitioner's burden on federal habeas review to demonstrate that the state supreme court's rejection of her federal constitutional claim – if one is alleged in the first instance – was either contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Williams' conclusory claim fails to allege the denial of a specific constitutional right, fails to allege any factual specifics in support of her claim with regard to the jury charge requested, and fails to demonstrate that the state supreme court's rejection of her claim

an "extreme malfunction" in the Nevada state criminal justice system as would warrant relief under AEDPA. This is a completely meritless claim, both strictly on the record presented as well as in actual truth.

1 was contrary to or an unreasonable application of clearly established federal law under
2 any United States Supreme Court precedent.

3 Independent review of the record reflects that Williams requested the following jury
4 instruction, as read by defense counsel when the charges were settled:

5 If the jury finds that the State has proven beyond a
6 reasonable doubt the defendant's blood contained two or
7 more nanograms of marijuana and/or five or more nanograms
8 of marijuana metabolite, then it is – it's encumbent [sic] upon
9 the jury to find beyond a reasonable doubt that the two or
more nanograms of marijuana and/or five or more nanograms
of marijuana metabolite came from those parts of the
marijuana plant listed in N.R.S. 453.09r6 [sic], subsection (1).

10 (ECF No. 76-2, at 13.)

11 The State objected to the proposed instruction on the basis that: (a) there had been
12 no evidence presented in the case that the marijuana in evidence and that was smoked
13 was anything other than the illegal portion of the plant; (b) the baggie of marijuana was in
14 evidence for the jury to see; (c) there had been no defense presented on it; and (d) the
15 instruction thus would only confuse the jury. The trial court sustained the objection. (*Id.*)⁴⁰

16 On the minimal state court record and federal court argument presented, Williams
17 has not demonstrated that the state supreme court's rejection of this claim – to any extent
18 that a federal constitutional claim even has been articulated even in this Court at this late
19 juncture – was either contrary to or an objectively unreasonable application of clearly
20 established federal law as determined by the United States Supreme Court at the time of
21 the state court's August 2, 2002, decision. Williams does not cite any Supreme Court
22 authority, much less apposite authority, that the state court decision was contrary to or
23 unreasonably applied.⁴¹ Moreover, as described in the factual background *supra* in the

24 ⁴⁰ The Court notes again that Williams neither exhausted in the state courts nor raised in her federal
25 pleadings any claim challenging any pretrial ruling in limine restricting the presentation of evidence
26 regarding parts of the marijuana plant. The only pertinent claims that were exhausted and then raised in
federal court challenged the sufficiency of the evidence and the refusal to give the additional jury charge.
(See note 36, *supra*.)

27 ⁴¹ While Williams cites no federal cases on this claim, at any level, the Court notes that lower federal
28 court cases discussing a generalized due process right to a theory-of-defense instruction – particularly in
cases arising before AEDPA – would not suffice. Under AEDPA, Williams must show that the state court's

discussion of Ground 5(a), Williams argued her stems-and-seeds defense to the jury and the jury instructions included the statutory definition of “marijuana” upon which she based the argument. It thus does not appear that – under whatever unalleged federal constitutional theory upon which she seeks to proceed – Williams sustained any actual material prejudice as a result of the trial court’s refusal to give the additional jury charge.

Ground 5(b) therefore does not provide a basis for federal habeas relief.⁴²

Ground 7: Juanita McDonald Case

In Ground 7,⁴³ Williams alleges that the state trial court erred when the court ruled that the defense could not refer to another case, the *Juanita McDonald* case. Williams asserts – again without specific citation to support in the state court record – that the lab that tested Williams’ blood tested Juanita McDonald’s blood higher for marijuana metabolite than a police laboratory allegedly had.⁴⁴

In its concluding paragraph in its August 2, 2002, order of affirmance on direct appeal, the Supreme Court of Nevada summarily rejected, *inter alia*, Williams’ claim “that the district court erred by prohibiting her attorney from talking about an unrelated case,” for lack of merit. *Williams I*, 118 Nev. at 554, 50 P.3d at 1127. To the extent, if any, that Williams states a federal constitutional claim, the Court reviews the state supreme court’s summary rejection of the claim under AEDPA’s deferential standard of review. (See text, *supra*, at 69-72.)

Williams alleges only that the state trial court “committed reversible error.” Petitioner does not allege that she was denied a federal constitutional right. She does not cite any apposite United States Supreme Court authority establishing a federal

decision was contrary to or unreasonably applied an apposite holding of the United States Supreme Court in existence on August 2, 2002. She has not even attempted to do so here.

⁴² See also note 39, *supra*, regarding the underlying fundamental flaw in this theory of defense. The Court’s decision, however, is based upon the record and argument presented herein.

⁴³ The Court dismissed Ground 6 as bare and conclusory. (ECF No. 116, at 11.)

⁴⁴ With only minor variation primarily as to style, form or supporting citation, Ground 7 in the amended petition filed by appointed counsel is the same as in the original and amending petitions filed by original counsel.

1 constitutional violation. As the Court noted as to Ground 5(b), federal habeas review is
 2 not a second *de novo* direct appeal in which the federal district court rehears claims of
 3 state district court error under state law. The federal habeas petitioner instead must
 4 allege federal claims with particularity, including specifying the federal constitutional
 5 ground upon which she relies. *Felix, supra*. Further, as also has been noted repeatedly
 6 herein, it is the petitioner's burden on federal habeas review to demonstrate that the state
 7 supreme court's rejection of her federal constitutional claim – if one is alleged in the first
 8 instance – was either contrary to or an unreasonable application of clearly established
 9 federal law as determined by the United States Supreme Court at the time of the state
 10 supreme court's decision. In counseled filings, Williams fails to specify the federal
 11 constitutional ground upon which she relies and fails to demonstrate that the state
 12 supreme court's rejection of her claim was contrary to or an unreasonable application of
 13 clearly established federal law under any apposite Supreme Court precedent existing at
 14 the time of its decision on August 2, 2002.

15 Ground 7 therefore does not provide a basis for federal habeas relief.⁴⁵

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17 ///

18 ⁴⁵ In a February 20, 2007, motion to dismiss, respondents sought, *inter alia*, the dismissal of Ground
 19 7 for failure to state a cognizable claim. (ECF No. 38, at 9; ECF No. 41, at 2.) In its order on that motion
 20 to dismiss, the Court reached only exhaustion issues as to Grounds 2 and 3; and the Court deferred
 21 consideration of the remaining issues until after Williams sought appropriate relief vis-à-vis the unexhausted
 22 Ground 2. (ECF No. 42, at 1 & 4-5.) Thereafter, the Court gave respondents an opportunity to file a
 renewed motion to dismiss pursuing the deferred issues. (ECF No. 50.) In that renewed motion,
 respondents, without explanation, did not again argue that Ground 7 failed to state a cognizable claim.
 (ECF No. 52.)

23 While Ground 7 does not state a cognizable claim, the Court's disposition herein instead is on the
 24 merits. Two different sets of lawyers have filed two replies for Williams; and, each time, they have declined
 25 to present any argument in support of Ground 7, deferring to what are facially inadequate allegations in the
 26 original and amending petitions. (ECF No. 77, at 6; ECF No. 127, at 2.) Counsel thus repeatedly have
 27 declined to articulate a federal constitutional basis for the claim, have failed to cite to any record support
 28 for the claim, and have failed to identify any United States Supreme Court authority supporting the claim,
 which is subject to deferential review under AEDPA. With no elaboration of the inadequately presented
 claim after nearly sixteen years and two sets of lawyers, the appropriate disposition of this claim at this
 point is on the merits rather than for failure to state a cognizable claim possibly with leave to amend. *Accord*
James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (inadequate conclusory allegations do not warrant federal
 habeas relief). The claim further is mooted by the grant of relief on Ground 8(a), as it would not lead to
 greater relief – if a federal constitutional claim were presented, which it is not – than that granted on Ground
 8(a), *i.e.*, a possible retrial.

1 ***Consideration of a Certificate of Appealability***

2 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must
3 issue or deny a certificate of appealability (COA) when it enters a final order adverse to
4 the applicant. Based on its holding on Ground 8(a), the Court is granting a conditional
5 writ of habeas corpus subject to a possible retrial. However, the Court otherwise is
6 denying relief on the remaining grounds. Some of the rejected grounds could have or at
7 least conceivably could have led instead to an unconditional writ grant if they had been
8 meritorious. The Court's final order thus is in part adverse to petitioner.

9 Following a limited and conditional writ grant, there are circumstances in which a
10 petitioner will not need to obtain a COA to pursue certain grounds in the court of appeals.
11 If respondents appeal the conditional writ grant, then petitioner as appellee would not
12 need to cross-appeal and would not need to obtain a COA to argue any ground pursued
13 in support of the district court's judgment, so long as petitioner does not seek greater
14 relief under the judgment via that ground, even if the alternative ground pursued may
15 involve an attack on the district court's reasoning. *Jennings v. Stephens*, 574 U.S. 271,
16 276-83 (2015). Petitioner would need to timely appeal or cross-appeal and obtain a COA,
17 however, to pursue any ground upon which she at least seeks to obtain greater relief than
18 that granted in the district court, such as an unconditional writ grant vacating her
19 convictions without a possible retrial. *See id.*

20 This Court cannot foretell whether either or both sides will either appeal or cross-
21 appeal. Nor can it foretell what specific relief petitioner might seek in pursuing any
22 rejected grounds in the Court of Appeals. *Cf. id.*, at 281 (a cross-appeal is required not
23 merely where a party, if fully successful on her arguments, would certainly obtain greater
24 relief than that provided below; a cross-appeal is required if the party's arguments are
25 presented "*with a view* either to enlarging [her] own rights thereunder or of lessening the
26 rights of [her] adversary") (quoting prior authority with emphasis added in *Jennings*).

27 The more prudent course for this Court therefore would be to make a COA ruling
28 as to each rejected ground, regardless of whether a COA ultimately may be required as

1 to that ground on any appeal, without the Court seeking to project whether a COA likely
 2 will be required. That way, if the Court of Appeals determines that a COA is required in
 3 the circumstances then presented to that court on any appeal, there will be no need for a
 4 limited remand to the district court for consideration of whether to issue a COA as to any
 5 ground.

6 To obtain a COA as to the claims rejected by the district court on the merits, under
 7 28 U.S.C. § 2253(c), a petitioner must make a "substantial showing of the denial of a
 8 constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Hiivala v. Wood*,
 9 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this standard, the petitioner "must
 10 demonstrate that reasonable jurists would find the district court's assessment of the
 11 constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484.

12 As to claims rejected instead on procedural grounds, the petitioner must show: (1)
 13 that jurists of reason would find it debatable whether the petition stated a valid claim of a
 14 denial of a constitutional right; and (2) that jurists of reason would find it debatable whether
 15 the district court was correct in its procedural ruling. *Id.*, at 484. While both such
 16 showings must be made to obtain a COA, "a court may find that it can dispose of the
 17 application in a fair and prompt manner if it proceeds first to resolve the issue whose
 18 answer is more apparent from the record and arguments." *Id.*, at 485. Where a plain
 19 procedural bar is properly invoked, an appeal is not warranted. *Id.*, at 484.

20 The Court accordingly makes the following COA rulings, in serial order, to the
 21 extent that a COA ultimately is required as to the specific grounds on any appeal.

22 A COA will be denied as to **Ground 1**, including both parts (a) and (b), as jurists
 23 of reason would not find the Court's rejection of the claim herein on the merits to be
 24 debatable or wrong. The state supreme court's decision was neither contrary to nor an
 25 objectively unreasonable application of the controlling Supreme Court authority in, *inter*
 26 *alia*, *Arizona v. Youngblood*, 488 U.S. 51(1988). Any alleged variance with either state
 27 court cases or lower federal court cases does not provide a basis for relief under AEDPA.
 28 **(See text, *supra*, at 32-44.)**

1 A COA will be denied as to the Court's earlier procedural ruling that **Ground 2** is
2 unexhausted, as jurists of reason would not find it debatable whether the district court
3 was correct in that procedural ruling. Petitioner further did not pursue the voluntarily
4 dismissed ground when this action later was stayed for exhaustion, with the stay order
5 expressly eschewing placing any limits on the claims that could be pursued during the
6 stay. **(ECF No. 50; ECF No. 91, at 3; ECF No. 110, at 20. See text, *supra*, at 45 n.20.)**

7 A COA will be denied as to the Court's earlier procedural ruling that **Ground 3**
8 does not present a federal claim cognizable on federal habeas review as opposed to a
9 purely state law claim. Jurists of reason would not find it debatable whether the district
10 court was correct in that ruling. **(ECF No. 116, at 10.)** Moreover, the state supreme court
11 rejected the claim presented to that court on the merits, and Williams cites no apposite
12 Supreme Court authority as of that time holding that the Due Process Clause mandates
13 that the states consider preexisting negligence by another party to be relevant to the
14 question of whether a defendant's own conduct was a proximate cause of death or injury
15 in determining culpability under a criminal statute. Williams therefore would not present
16 a viable federal claim in any event under AEDPA. **(See text, *supra*, at 45 n.20.)**

17 A COA will be denied as to the Court's rejection on the merits of the four distinct
18 constitutional claims in **Ground 4**, which the Court has subdivided into parts (a) through
19 (d). Jurists of reason would not find the rejection of the four claims to be debatable or
20 wrong, as the state supreme court's decision on each claim was neither contrary to nor
21 an objectively unreasonable application of Supreme Court precedent at the time of the
22 state court's decision. **(See text, *supra*, at 45-68.)**

23 A COA will be denied as to the Court's rejection on the merits of the two factually
24 related but legally distinct claims in **Ground 5**, which the Court has subdivided into parts
25 (a) and (b). Jurists of reason would not find the rejection of the two claims to be debatable
26 or wrong. The state supreme court's summary rejection of the two claims was neither
27 contrary to nor an objectively unreasonable application of Supreme Court precedent.
28 *Inter alia*, petitioner's underlying premise that the baggie of marijuana in evidence

1 contained portions of the marijuana plant that were not illegal under state law is not
 2 supported by the minimal record on the point. **(See text, *supra*, at 69-81; see also *id.*,
 3 at 78 n.39.)**

4 A COA will be denied as to the Court's procedural ruling dismissing **Ground 6** as
 5 bare and conclusory. Jurists of reason would not find it debatable whether the district
 6 court was correct in that ruling. **(ECF No. 116, at 11.)**

7 A COA will be denied as to **Ground 7**, as jurists of reason would not find the Court's
 8 rejection of the claim herein on the merits to be debatable or wrong. Indeed, the ground
 9 does not even allege a federal constitutional claim. **(See text, *supra*, at 81-82.)**

10 On **Ground 8(a)**, on *de novo* review, the Court has granted a conditional writ of
 11 habeas corpus, subject to a possible retrial. **(See text, *supra*, at 5-26 & 29 n.12.)**
 12 Petitioner has not requested greater relief in the district court on Ground 8(a) than has
 13 been provided herein. **(See ECF No. 110, at 44 & 47.)** It thus does not appear that
 14 consideration of a possible COA as to any aspect of Ground 8(a) is required.

15 A COA will be denied as to the due process statutory vagueness challenge in
 16 **Ground 8(b)**. Jurists of reason would not find the Court's rejection of the claim on the
 17 merits on *de novo* review herein to be debatable or wrong. *Inter alia*, there was no
 18 contradictory vagueness in the statute as written. The true problem in the case instead
 19 is that the Supreme Court of Nevada read clear and precise limiting language in N.R.S.
 20 484.1245 out of that statute. That is a judicial expansion issue, which led to the Court
 21 granting relief on Ground 8(a). There is no vagueness, however, in the statutes as written,
 22 which instead are very clear and precise. Grounds 8(a) and 8(b) are alternative but
 23 contradictory grounds for relief. The Court's grant of relief on Ground 8(a) necessarily
 24 leads to the rejection of the contradictory Ground 8(b). **(See text, *supra*, at 27-29.)**

25 Finally, a COA will be denied as to the ineffective-assistance claims in **Ground 9**
 26 based on the failure of trial and appellate counsel to raise the claims in Ground 8. Jurists
 27 of reason would not find the Court's rejection of the claims on the merits on *de novo*
 28 review to be debatable or wrong. The meritorious constitutional claim in Ground 8(a) had

1 not arisen at the time of the trial and direct appeal, and the rejection of Ground 8(b) herein
2 leads to the rejection of the remaining aspect of Ground 9. **(See text, *supra*, at 31-32.)**

3 IT THEREFORE IS ORDERED that the petition, as amended, is GRANTED IN
4 PART and DENIED IN PART, with the Court granting the relief specified below on Ground
5 8(a) and denying any relief on any of the other claims raised herein.

6 IT FURTHER IS ORDERED that a writ of habeas corpus is conditionally
7 GRANTED and that the judgment of conviction filed on April 6, 2001, in No. 00C166483
8 in the Eighth Judicial District Court for the State of Nevada hereby is VACATED IN PART,
9 with the six convictions for driving and/or being in actual control of a vehicle with a
10 prohibited substance in the blood resulting in death in Counts I through VI hereby being
11 VACATED, and that petitioner Jessica Williams shall be released from all custody and/or
12 other restraints under said vacated convictions, including parole or other supervision,
13 within thirty (30) days of the later of the conclusion of any proceedings, by any party,
14 seeking appellate or *certiorari* review of this Court's judgment, if affirmed in relevant part,
15 or the expiration of the delays for seeking such appeal or review, unless the State through
16 respondents files a written election in this matter within that thirty day period to retry
17 petitioner and thereafter commences jury selection in the retrial within one hundred twenty
18 (120) days following the election to retry, subject to reasonable request for modification
19 of the time periods in the judgment by either party pursuant to Rules 59 or 60.

20 IT FURTHER IS ORDERED that the Clerk of Court shall enter final judgment
21 accordingly in favor of petitioner and against respondents, conditionally granting the
22 petition for a writ of habeas corpus as provided in the preceding two paragraphs. It is the
23 Court's intention that the judgment so entered will be final and appealable, concluding the
24 matter in the district court, subject to the above-referenced post-judgment motions
25 following the conclusion of any review or the expiration of the time to seek such review.

26 IT FURTHER IS ORDERED that a certificate of appealability, to the extent that one
27 is required, is DENIED as to all claims as to which relief has been denied, for the reasons
28 outlined in the text, *supra*, at 83-87.

1 The Clerk further shall provide a copy of this order and the judgment to the Clerk
2 of the Eighth Judicial District Court, in connection with that court's No. 00C166483.

3 DATED: June 18, 2020

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7 KENT J. DAWSON
8 United States District Judge
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